TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 190

WILLIAM H. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, PETITIONER,

vs.

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, ET AL, EXECUTORS

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF FAIRFIELD COUNTY, STATE OF CONNECTICUT

PETITION FOR CERTIORARI FILED MARCH 5, 1927

CERTIORARI GRANTED APRIL 25, 1927

No. 191

ARTHUR SILBERMANN, CHARLES MOEBIUS, JOSEPH PLAUT, ET AL., EXECUTORS, ETC., PLAINTIFFS IN ERROR,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF CONNECTICUT

FILED MARCH 5, 1927

(28,581, 28,582)

(32,531, 32,532)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 11, 1927

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[fol. 1] [Caption omitted]

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[fols. 2 & 3]

IN PROBATE COURT FOR DISTRICT OF STAMFORD

MOTION FOR APPEAL—Filed in Superior Court January 2, 1926

Estate of ROBERT B. HIRSCH, Late of Stamford, in said District, Deceased

To the Probate Court for the District of Stamford:

The subscribers represent that:

(1) They were appointed executors in any by the will of Robert B. Hirsch, deceased, who last dwelt in Stamford, Connecticut, and died on the 23rd day of September, 1924, and duly qualified as such in this court upon hearing duly had, on the 15th day of January, 1925.

(2) On the 4th day of December, 1925, this court made an order and decree, allowing and approving a certain computation of inheritance and succession tax due the State of Connecticut from the estate of the said Robert B. Hirsch, deceased, filed in this court by William H. Blodgett, Tax Commissioner of the State of Connecticut, on the 15th day of September, 1925, and ordering that the total amount of said tax be the sum of $188,780.58 as fixed by the computation of the Tax Commissioner filed as aforesaid, and that the said executors forthwith pay the amount of said tax to the Treasurer of the State of Connecticut, and exhibit to this court a proper receipt therefor.

(3) The subscribers are aggrieved by said finding, order and decree of this court.

Wherefore, the subscribers move an appeal, and do hereby appeal from said order and decree to the Superior Court to be held at Bridgeport, within and for the County of Fairfield, on the first Tuesday of January, 1926, and

herewith give a bond with sufficient surety to prosecute said appeal to effect.

Dated this 18th day of December, 1925.

Arthur Silberman, Charles Moebius, Joseph Plaut, Abraham L. Gutman.

Bond on appeal for $150.00, approved and filed January 2, 1926, omitted in printing.

[fol. 4] In Probate Court for District of Stamford

Estate of Robert B. Hirsch, Late of Stamford, in said District, Deceased

December 28, 1925.

Present: Hon. Floyd B. Bartram, Judge.

Order Allowing Appeal—Filed in Superior Court January 2, 1926

Upon the written motion of Arthur Silberman, Charles Moebius, Joseph Plaut and Abraham L. Gutman, executors of the will of said decedent, showing to this court that they are aggrieved by an order and decree of this court made and entered on the 4th day of December, 1925, allowing and approving a certain computation of inheritance and succession tax due the State of Connecticut from the estate of said Robert B. Hirsch, deceased, filed in said Court by William H. Blodgett, Tax Commissioner of the state of Connecticut, on the 15th day of September, 1925, and ordering that the total amount of said tax be the sum of $188,780.58 as fixed by the computation of the Tax Commissioner filed as aforesaid, and that said executors forthwith pay the amount of said tax to the Treasurer of the State of Connecticut, and exhibit to said Court a proper receipt therefor, and being so aggrieved, now within one month from the rendition of said order and decree, they have appealed therefrom to the Supreme Court to be held at Bridgeport, within and for the County of Fairfield on the

first Tuesday of January, 1926, and have offered sufficient bond to prosecute said appeal to effect as by said motion dated December 18, 1925, on file and record in this Court will more fully appear.

This Court finds the allegations of said motion to be true, and thereupon grants said motion and allows said appeal.

And the said Arthur Silberman, Charles Moebius, Joseph Plaut and Abraham L. Gutman as principals, and Charles D. Lockwood, of said Stamford, as surety, have given bond as required by law, to the State of Connecticut, in the penal sum of one hundred fifty dollars, to prosecute said appeal to effect, which bond is approved and accepted by this Court and ordered to be recorded and kept on file, and it is therefore

[fol. 5] Ordered, That said appellants cause notice of said appeal to be given to William H. Blodgett, by some proper officer or indifferent person, by depositing a true and attested copy of this motion and of this order, in the post office, postage paid, at Stamford, Connecticut, directed to said William H. Blodgett, by registered letter, at State Capitol, Hartford, Connecticut at least four days before the first Tuesday of January, 1926, and that due return be made to said Superior Court.

Floyd B. Bartram, Judge.

State of Connecticut,
County of Fairfield, ss:

Stamford, December 31st, 1925.

Then and there I made service hereof by depositing a true and attested copy of said motion and of this order, in the post office, postage paid, at Stamford, Connecticut, directed to said William H. Blodgett, by registered letter at State Capitol, Hartford, Connecticut.

Attest: Andrew Schlechtweg, Constable of the Town of Stamford.

[File endorsement omitted.]

Judge's certificate to foregoing papers omitted in printing.

[fol. 6] In Superior Court of Fairfield County

Arthur Silberman, Charles Moebius, Joseph Plaut, Frank C. Lewis, and Abraham L. Gutman, Executors,

vs.

William H. Blodgett, Tax Commissioner

(Appeal from Probate)

Reasons of Appeal—Filed January 11, 1926

Arthur Silberman, Charles Moebius, Joseph Plaut, Franklin C. Lewis and Abraham L. Gutman, executors of the will of Robert B. Hirsch, late of Stamford, Fairfield County, Connecticut, hereby specify their reasons of appeal from the decree of the Court of Probate for the District of Stamford dated December 4, 1925, approving the computation of succession tax due to the State of Connecticut from the estate of said Robert B. Hirsch, filed by William H. Blodgett, Tax Commissioner of the State of Connecticut, in said Court of Probate on September 15, 1925; and determining the total amount of said succession tax is $188,780.58, and finding that said estate is subject to the succession tax to the State of Connecticut, and direct-[fol. 7] ing the executors to pay the amount of said tax to the Treasurer of the State of Connecticut, as set forth in said order.

1. Said Court of Probate erred in holding that all of said estate appearing in the inventory of the assets of said estate on file in said Probate Court is subject to the Connecticut succession tax.

2. Said Court of Probate erred in holding that the computation of succession tax due to the State of Connecticut from the estate of said decedent, amounting to $188,780.58, made by William H. Blodgett, Tax Commissioner of the State of Connecticut, is correct.

3. Said Court of Probate erred in holding that the interest of the decedent in the partnership of William Openhyn & Sons, New York, is subject to the Connecticut succession tax.

4. Said Court of Probate erred in holding that the bonds owned by the decedent and located without the State of Connecticut are subject to the Connecticut succession tax.

5. Said Court of Probate erred in holding that the stocks owned by the decedent of corporations not organized under the laws of Connecticut, the certificates of which were physically located in New York City at the time of decedent's death, are subject to the Connecticut succession tax.

6. Said Court of Probate erred in holding that the miscellaneous property set forth in Schedule E of the inventory filed by the executors with the Court of Probate for the District of Stamford is to the extent that it is due from non-residents of the State of Connecticut (which includes all of said miscellaneous property, except the "Lassner account receivable") subject to the Connecticut succession tax.

7. Said Court of Probate erred in not holding that the attempt of the State of Connecticut to levy a succession tax on the transfer of said partnership interest, said bonds, said stock and said miscellaneous property due from non-residents of Connecticut, constitutes the taking of property without due process of law in violation of the Federal constitution.

[fol. 8] 8. Said Court of Probate erred in not holding that the transfer of said partnership interest, bonds, stocks, and miscellaneous property due from non-residents of Connecticut took place under and by virtue of the laws and authority of the State of New York and the authority of the Surrogate's Court of New York County, New York State, conferred by said laws, and without any right, intervention or power in relation thereto vested in or exercised by the Court of Probate for the District of Stamford or by the State of Connecticut.

9. Said Court of Probate erred in not holding that the attempt of the State of Connecticut to assert jurisdiction or authority in relation to said transfer amounts to a failure to give full faith and credit to the laws of the State of New York conferring jurisdiction and power upon said Surrogate's Court of New York County, and relating to

said transfer, and is accordingly in violation of the Federal Constitution.

10. Said Court of Probate erred in holding that the gifts made by the will of the decedent to educational and charitable corporations in New York, and to trustees for the benefit of the Ethical Culture Society, a charitable and religious corporation organized in New York, are not exempt from the Connecticut succession tax.

Arthur Silberman, Charles Moebius, Joseph Plaut, Franklin C. Lewis, and Abraham L. Gutman, Executors of the Will of Robert B. Hirsch, deceased, by Cummings & Lockwood, Their Attorneys.

[File endorsement omitted.]

[fol. 9] In Superior Court of Fairfield County

[Title omitted]

Stipulation of Facts and Questions of Law—February 26, 1926

The parties to the above entitled action hereby stipulate that the facts are as follows:

1. Robert B. Hirsch died on September 23, 1924, a resident of and domiciled at Stamford, Fairfield County, Connecticut, leaving a will dated February 28, 1917, and two codicils thereto dated January 22, 1918, and January 23, 1919, respectively, which will and codicils were all executed in the City of New York, State of New York, in accordance with the requirements of the laws of both the State of New York and the State of Connecticut.

2. The plaintiffs, Charles Moebius, Arthur Silberman, Joseph Plaut, Franklin C. Lewis, and Abraham L. Gutman, named as executors in the twenty-fourth paragraph of the will of said decedent, are all residents of the State of New York, with the exception of Charles Moebius, who is a resident of the State of New Jersey, but whose business is within the State of New York. Emil Berolzheimer, named an executor in the will, predeceased the decedent.

3. At the time of the decedent's death, he owned the following property, the values given being those at the date of his death:

[fol. 10] (a) Real estate situated in Stamford, Connecticut	$45,000 00
(b) Bonds, as per Exhibit A hereto annexed.	615,642 84
(c) Stocks, as per Exhibit B hereto annexed.	277,984 25
(d) Interest in partnership of William Openhym & Sons, of New York	1,687,245 34
(e) Furniture in Stamford, Connecticut	243 00
(f) Cattle, horses, poultry, auto, wagons and carriages, situated in Stamford, Connecticut	1,058 75
(g) Other miscellaneous property as per Exhibit C hereto annexed	17,891 67
	2,645,065 85

4. Of said property, the real estate, furniture, cattle, horses, poultry, auto, wagon- and carriages set forth in Paragraph 3, subdivision- (a), (e) and (f) above, were physically located within the State of Connecticut at the time of the death of said decedent.

5. All of the bonds and the certificates of the shares of stock set forth in Exhibits A and B hereto annexed were at the time of the decedent's death, and for a long time prior thereto had been physically located in safe deposit boxes in the State of New York. Of the bonds none were due to the decedent from residents of Connecticut, or corporations organized under the laws of Connecticut, with the exception of the mortgage bonds of The Hubbard Heights Golf Club, Inc., valued at $521.67, and the bonds of The Stamford Woman's Club, Inc., which had no value. Of the shares of stock none were of corporations organized under the laws of Connecticut, with the exception of three shares of stock of the Stamford Theatre, Inc., valued at $120.00.

6. Of the miscellaneous property set forth in Exhibit C hereto annexed, the entire amount was due from corporations doing business in New York and located in the State of New York, and not organized under the laws of Con-

necticut, with the exception of the "Lassner account receivable," amounting to $2,675.52, which was due to the decedent from a resident of the State of Connecticut, and [fol. 11] with the exception of the item of cash on hand in New York, amounting to $287.48, which consisted of coins and bank notes.

7. The partnership of William Openhym & Sons, of which the decedent was a general partner, and the interest in which forms the largest part of his estate, was a limited partnership organized under New York law, and having its principal place of business in New York City, in said State of New York, the last agreement therefor being dated December 1, 1921, at New York City. All of the surviving members of the firm are residents of the State of New York.

8. The parnership agreement provided that in the event of the death of any of the parties thereto the partnership should be dissolved, and the interest or share of the deceased partner should be taken and stated at the sum standing to the credit of the account of such deceased partner as shown by the inventory taken next preceding the date of such death, except that in determining said share the parties agreed that all shares of stock of mill or manufacturing companies should be valued at the book value in accordance with the books of such mill or manufacturing companies as per the inventory preceding the date of death, and the value of all marketable securities, such as bonds and shares of stock, that might be listed upon any exchange should be taken at the fair and reasonable market value at the time of death of the partner.

9. In accordance with said provisions of said partnership agreement the items of assets of said partnership, exclusive of "partners' investments," as hereinafter explained, were valued as follows:

(a)	Deposits in New York and French banks	$213,312 19
(b)	Trade acceptances, none of which were due from Connecticut residents or corporations	63,810 41
(c)	Notes and loans receivable, none of which were due from Connecticut residents or corporations	5,484 52

(d) Accounts receivable, less reserve for discount, of which $3,323.61 were due from Connecticut residents or corporations .	878,686	90
[fol. 12]		
(e) Merchandise inventory, physically situat- in New York	68,042	99
(f) Advances to consignors, none of which were due from Connecticut residents or corporations	1,165,025	11
(g) Prepaid expenses and advances to travelers, none of which were due from Connecticut residents or corporations	6,150	22
(h) Furniture and fixtures, physically situated in New York	8,000	00
(i) Real estate at College Point, Long Island, New York	15,812	27
(j) Rossie Velvet Company (incorporated under the laws of the State of New Jersey; plant situated at Mystic, Connecticut)	344,901	01
(k) Manhattan Silk Company (incorporated under the laws of the State of West Virginia; plant situated in New York City)	310,118	00
(l) United States Liberty Loan bonds, situated in New York City	692,421	40
(m) Stocks and bonds of corporations not incorporated under the laws of Connecticut (the certificates of stock and the bonds being situated in New York City)	1	00

10. In addition to the above partnership assets, the partnership held certain securities, delivered by the decedent to the partnership, entitled "partner's investments," pursuant to the terms of a letter agreement dated December 1, 1923, a copy of which is hereto annexed and marked Exhibit D.

11. Said "partner's investments," with their values as of the date of death of said decedent, are set forth in Exhibits A and B hereto annexed.

12. The partnership liabilities were determined pursuant to the provisions of said partnership agreement to be as follows:

Notes Payable	$525,000 00
Accounts Payable	238,133 32
Deposits Payable	206,470 73

[fol. 13] 13. With reference to the item "Advances to Consignors" (Paragraph 9, subdivision (f), the partnership had in its possession within the City of New York collateral securities in the form of merchandise of a value at all times in excess of the amount of advances to the respective consignors.

14. A summary of the provisions of the will and two codicils of the decedent is as follows:

Paragraph First directs the payment of debts, funeral and testamentary expenses.

Paragraph Second contains a bequest to an individual named of certain personal effects as a token of affection.

Paragraph Third bequeaths $300,000 and the proceeds of a life insurance policy in the Mutual Life Insurance Company of New York to certain trustees, all of whom are residents of New York, to pay the income during life to Mrs. Lassner, a resident of Stamford, Connecticut and upon her death to pay the principal of the fund to her daughter, who is also a resident of Stamford.

Paragraph Fourth devises to said Mrs. Lassner all of the real estate owned by the decedent and located in Stamford, Connecticut, and bequeaths the horses, cattle, automobiles and farm implements in and about said premises to her.

Paragraph Fifth bequeaths the sum of $20,000 to three trustees residing in New York City for the benefit of a cousin residing in Paris, who predeceased testator, with the proviso that in such event the principal of said legacy should become part of the residuary estate.

Paragraph Sixth bequeaths the sum of $12,500 to three trustees residing in New York City for the benefit of a daughter of said cousin, who also resides in Paris, for life, and upon her death, gives the principal of said legacy to the children of said French legatee.

Paragraph Seventh bequeaths a like amount of $12,500 to three trustees residing in New York City for the benefit of another daughter of said French cousin with similar [fol. 14] provisions as to the disposition of the principal of the legacy.

Paragraph Eight- bequeaths $5,000 each to three cousins named, all of who- reside in the City of New York and who survived testator.

Paragraph Ninth bequeaths $10,000 to trustees residing in New York to pay the income to one of testator's friends for life, said friend being a resident of New York, with direction to pay the principal to her issue, and in default of issue, the said principal becomes part of the residuary estate.

Paragraph Tenth bequeaths the sum of $10,000 to said trustees residing in the City of New York to pay the income to a servant of testator, who resides in Stamford, for life, with provision that the principal shall become part of the residuary estate upon her death.

Paragraph Eleventh bequeaths the sum of $25,000 to the Hudson Guild of the City of New York; $20,000 to Cooper Union for the Advancement of Science and Art of said City of New York; $10,000 to the Educational Alliance of said City of New York; $10,000 to the Hebrew Technical Institute for Boys of said City of New York; $10,000 to the Hebrew Technical Institute for Girls of said City of New York.

Paragraph Twelfth bequeaths the sum of $10,000 to the three New York Trustees above mentioned to pay income to a friend of testator in the City of New York, with the direction that the principal shall, upon her death, become part of the residuary estate. Said legacy was increased by a Codicil to the sum of $25,000.

Paragraph Thirteenth bequeaths to the Superintendent of the Ethical Culture School the sum of $15,000.

Paragraph Fourteenth contains the disposition of the residuary estate and is herein quoted in full as follows:

"Fourteenth. All the rest, residue and remainder of my estate of whatsoever kind to which I may be entitled at the time of my death, including all [fol. 15] legacies that for any reason may not have taken effect, I give, devise and bequeath unto Dr.

Felix Adler, Dr. John L. Elliott, Joseph Plaut, Robert D. Kohn, Emil Berolzheimer, B. Edmund David, Adelaide Pfeiffer Oppenheimer, Franklin C. Lewis, Alexander M. Bing, Herbert A. Wolff, Abraham L. Gutman and the Union Trust Company of New York, their survivors and survivor, successors and successor, in trust for the following purposes:—to invest the same as directed in paragraph Fifteenth of my will, and apply the net income thereof to the free education of poor and deserving children in the Ethical Culture School, now maintained by The Society for Ethical Culture in the City of New York or any other school carrying out the same purpose which may, at any time, be owned or maintained by or associated or affiliated with said Society for Ethical Culture, and also to the free education, maintenance and support of poor and deserving young men and women who may desire to fit themselves for the career of teachers and who shall have displayed to the satisfaction of the directors of the said Society for Ethical Culture sufficient capacity for such career; the proportion or parts of the income to be applied to scholarships and to such teachers, to be absolutely in the discretion of the trustees herein named, my preference being, however, that the bulk of the income shall be applied to the free education of poor and deserving children as aforesaid; provided however that if at any time said Society shall be dissolved or shall disband or shall cease to own or maintain or have associated or affiliated with it said above mentioned school or some other school carrying out similar purposes then the trust above described shall cease and said trustees herein named shall transfer and pay over the corpus of said trust fund to some other corporation which at said time owns or maintains or has associated or affiliated with it a school or system of free education for poor and deserving children without distinction of sex, race, creed, or color according to the methods that had been generally maintained in or approved by said Ethical Culture School or [fol. 16] methods similar thereto, best adapted to carry out the above mentioned purposes, with the power to said Trustees herein named in their discretion to organize promptly a corporation for such purposes, viz: the free education of poor and deserving children without distinction of sex, race, creed or color according to the methods which had been generally maintained in or approved by

said Ethical Culure School or methods similar thereto best adapted to carry out the above mentioned purposes, to which corporation, when organized, the property or funds bequeathed to said Trustees herein named as aforesaid shall be transferred by said Trustees.

"If the aforesaid trust shall become effective then I authorize my said Trustees herein named acting by majority vote (of which majority said Union Trust Company of New York shall be one), to fill any vacancy in their number, whenever such vacancy may occur, whether caused by failure to qualify, resignation, death, removal or otherwise, by appointment in writing duly acknowledged. I request that if practicable there shall always be as many Trustees in number as originally appointed herein.

"If for any reason the foregoing disposition of my residuary estate herein contained shall be invalid, or for any cause shall fail to take effect either in whole or in part, then I give, devise and bequeath my residuary estate, or so much thereof as shall fail to pass or to take effect under the provisions of this paragraph, unto Dr. Felix Adler, Dr. John L. Elliott, Professor Edwin R. A. Seligman, Mrs. Adelaide Pfeiffer Oppenheimer, Mrs. Miriam Sutro Price, Mrs. Gerda Goldfare Stein, Joseph Plaut, Emil Berolzheimer, Robert D. Kohn, B. Edmund Davis, Alexander M. Bing and Herbert A. Wolff, absolutely and forever. In case any one of said legatees last named shall die, his share shall be equally divided amongst the survivors. I feel confident that said legatees above named will follow what they believe to be my wishes but I expressly declare that this shall not be construed as emphasizing a trust [fol. 17] or any restriction or limitation whatsoever upon the bequest so made to them, but in the event aforesaid said legatees last above named shall hold and possess the property so bequeathed to them absolutely to dispose of as they deem best and without any limitation or restriction whatsoever."

Paragraph Fifteenth contains the powers of investment granted to the trustees named in the Will.

Paragraph Sixteenth contains the power to sell real and personal property granted to the executors and also the trustees.

Paragraph Seventeenth directs that the income of each trust legacy shall be paid to the beneficiary without amortization.

Paragraph Eigteenth directs that all inheritance, succession or transfer taxes shall be paid out of the capital of testator's estate and not charged against the share of any beneficiary.

Paragraph Nineteenth directs the executors to carry out the provisions of any partnership agreement in force at the time of testator's death.

Paragraph Twentieth provides that a Mr. Silberman, one of the executors and trustees named in the Will, and a partner of testator, shall not be disqualified from purchasing the whole or any part of the testator's interest in his firm.

Paragraph Twenty-First grants to the trustees for the time being of any trust fund power to fill vacancies and add to their number.

Paragraph Twenty-Second grants to the executors power to settle and discharge claims and demands due or against the estate.

Paragraph Twenty-Third exempts the trustees from giving bonds for the faithful discharge of their duties.

Paragraph Twenty-Fourth names the executors and trustees of the Will, viz: Arthur Silberman, Charles Moebius, Emil Berolzheimer, Joseph Plaut, Franklin C. Lewis and [fol. 18] Abraham L. Gutman. Mr. Berolzheimer predeceased testator. The said paragraph contains, amongst other provisions, the following sentence: "I further declare it to be my will that every authority, right, power or duty herein conferred upon my said Executors may be exercised by a majority of said Executors with the same force and effect as if all had joined therein."

The first Codicil contains a bequest to each and every employee of testator's firm William Openhyn & Sons, who may be employed in New York or in Lyon, France, and to every employee of the Manhattan Silk Company who may be employed at the New York office at the time of his death a certain percentage of the salary of such employee.

The second Codicil bequeaths legacies amounting to $45,000 to three persons therein named, one of whom is a resident of Stamford, Connecticut, the other two of New York. Said Codicil also contains a bequest of $20,000 to the three New York trustees to pay the income to a friend

of Mr. Hirsch, who at the time of testator's death resided in the City of New York. Upon the death of such legatee, the principal becomes part of the residuary estate.

15. Said will and codicils were offered for probate to the Surrogate's Court of the County of New York, in the State of New York, by the persons named as executors therein, upon a petition, a copy of the material portions of which is hereto annexed marked Exhibit E. A citation was issued to the heirs and next of kin of the decedent in accordance with the New York practise, and duly served, and upon the return of said citation, said Surrogate made a decree, admitting the said will and codicils to probate on the 28th day of November, 1924. A copy of said decree is annexed hereto marked Exhibit F. Said Surrogate thereupon issued letters testamentary to the five executors above named in form similar to that used in the case of a domiciled resident of the State of New York. A copy of said letters testamentary is hereto annexed marked Exhibit G. The executors thereafter applied for an order to publish a notice to creditors to present claims, and upon the 8th day of [fol. 19] December, 1924, the Surrogate of the County of New York granted such an order, and notice to the creditors to present claims was published in accordance therewith. On account of the death of Emil Berolzheimer, one of the trustees named in said paragraphs 3rd, 6th, 7th, 9th, and 10th, Abraham L. Gutman qualified as a trustee in accordance with document designated a designation, executed by the other two trustees named in said paragraphs, and said Abraham L. Gutman filed his oath of qualification in the Surrogate's Court of New York County. The persons named as trustees in paragraph 14 of the will of said decedent have filed oaths of qualification in the office of said Surrogate of the County of New York. The executors filed a petition in said Surrogate's Court for the appointment of an appraiser to ascertain and determine the transfer tax due the State of New York and an order appointing such appraiser was entered on the 19th day of January, 1925, and the executors have filed schedules with said appraiser.

16. The executors opened a bank account in the Central Union Trust Company in New York, at 80 Broadway, in said City of New York, and deposited monies received by

them from time to time from said estate in said account, and have never opened any account in any bank or trust company in the State of Connecticut, or in any other State than New York State. The executors have paid from funds so deposited in said trust company in New York City all of the legacies provided for in paragraphs 8th, 11th and 13th of the will, and in the first and second codicils, amounting to $229,297.45, and have paid the debts of the decedent and the federal estate tax and New York transfer tax from such funds. The executors have further paid from funds so deposited to the trustees named in paragraphs 3rd, 6th, 7th, 9th, 10th and 12th of the will and paragraph 3rd of the second codicil the amounts mentioned therein as the capital of the trust fund for the benefit of certain individuals specifically named in said paragraphs, the total amount of said payments being $404,820.11. At the time of decedent's death, the certificates of stock listed in Exhibit B hereto annexed, and constituting a part of the "partner's investments," were registered in the name of the decedent, and were not endorsed by the decedent and subsequent to the decedent's death said stocks were sold and transfer thereof made to the purchaser thereof by the executors, upon exhibiting to the transfer agents of said stock letters [fol. 20] testamentary showing such qualification and authority issued to them by said Surrogate's Court. Upon exhibiting to the Mutual Life Insurance Company of New York a copy of said letters testamentary, together with a proof of claim and certificate of death of said decedent, and the policy issued by said company on the life of said decedent, the executors received from said Company the proceeds of said life insurance policy. Upon exhibiting to the National City Bank of New York a copy of said letters testamentary the executors received from said Bank the amount of money on deposit therein to the credit of the decedent at the date of his death.

17. On the 31st day of December, 1925, the transfer tax appraiser appointed by the Surrogate's Court of New York County filed a report, a copy of which is hereto annexed marked Exhibit H, showing the items of property belonging to said estate upon which the State of New York computed the transfer tax.

The said items were as follows:

List of Items Taxable in New York

25 shares American International Corp, at 27	675 00
100 shares Central Union Trust Co. of New York at 630	63,000 00
64 shares Chase National Bank	
64 shares Chase Securities, at 363)	23,232 00
65 shares Farmers Loan & Trust Co., at 695	45,175 00
18 shares First National Bank of New York)	
18 shares First Security Co., at 1867½)	33,435 00
42 shares Hanover National Bank, at 880	36,960 00
40 shares National City Bank of New York)	
40 shares National City Co., at 393)	15,720 00
25 shares United States Trust Co., of New York, at 1475	36,875 00
Partnership interest in William Openhym & Sons	1,683,269 56
	$1,938,341 56

Deductions

Funeral expenses, etc., $180,137.91, prorated at .7539802 to	135,820 42
Net New York estate	$1,802,521 14

[fol. 21] On the 6th day of January, 1926, the order of the Surrogate of New York County confirming said transfer tax appraiser's report fixing the tax was signed by said Surrogate. A copy of said order is hereto annexed marked Exhibit I. The said transfer tax appraiser's report exempts the legacies bequeathed to the following beneficiaries:

Hudson Guild	$18,849 51
Copper Union	15,070 50
Educational Alliance	7,539 80
Hebrew Technical Institute for Boys	7,539 80
Hebrew Technical Institute for Girls	7,539 80
Trustees for the benefit of the Sociey of Ethical Culture	1,388,645 06

The reason why the deductions were prorated as .7535802 and exemptions be in the proportion which the value of the

the reason why exemption of the full amount of the bequests to the first beneficiaries first named was not given is because the New York laws requires that such deductions and

bequests to the five beneficiaries first named was not given is because the New York law requires that such deductions and exemption be in the proportion which the value of the New York taxable estate bears to the value of the decedent's entire estate. The reason for the exemptions above set forth was that the gifts were made for educational, charitable or religious purposes, as the case may be. The amount of tax determined payable, to the State of New York by the said Surrogate's order was $19,166.04.

18. Any material changes or developments in the New York appraisal and transfer tax will be brought before this Court by further supplementary stipulation.

19. On January 8, 1925, the executors exhibited to the Court of Probate for the District of Stamford a duly authenticated and exemplified copy of the last will and testament of said decedent and of said codicils and of the record of the proceedings proving and establishing same in the Surrogate's Court of New York County and requested said Court of Probate to order said copies to be filed and recorded that they might become a part of the files and records of said Court of Probate pursuant to the Statute and the Law of the State of Connecticut; and the executors requested that letters testamentary be granted to the executors named and appointed in said will. A copy of said application is hereto annexed marked Exhibit J.

[fol. 22] On said January 8, 1925, said Court of Probate ordered that public notice be given of a hearing on said petition of the executors.

On January 15, 1925, said Court of Probate upon return of notice and hearing had, ordered that said copies be filed and recorded.

On said January 15, 1925, the executors filed in said Court of Probate a bond in the sum of $1,000.00 to the State of Connecticut, with surety, conditioned that they should well and faithfully discharge the duties of their appointment and according to law.

On said January 15, 1925, the said Court of Probate, reciting the filing and record of said exemplified copies, the appearance of the executors and their acceptance of the trust, and the filing of said bond, made an order approving and accepting said bond and ordering it on file and record,

and approving and granting letters testamentary to said executors. A copy of said order is hereto annexed marked Exhibit K.

On said January 15, 1925, said Court of Probate made an order limiting six months from the date thereof for the presentation of claims of creditors of said decedent; ordering citation to be given to said creditors; ordering said executors to make or cause to be made an inventory of all the property, including choses in action, of the estate of said decedent; and to deposit the same with said Court of Probate (duly sworn to by the executors) within two months of said January 15, 1925; and appointing J. Howard Bogardus and Frederick C. Hall, both of said Stamford, appraisers on said estate, under oath, to appraise all of such property; and allowing the executors twelve months from said January 15, 1925 for the settlement of said estate.

On March 9, 1925, the said executors filed in said Court of Probate an inventory and appraisal duly sworn to of the assets of said estate; which inventory showed a total appraised value of $2,645,065.85 and consisted of the items set forth in Paragraph 3 above.

[fol. 23] 20. Of the legatees named in the will and in the two codicils thereto annexed, only Harriet O. Lassner, Aleen Lassner, Joseph Thellian and Josephine French are residents of the State of Connecticut, living in the Town of Stamford, Fairfield County in said State; all of the other legatees and devisees reside outside of the State of Connecticut.

21. All of the institutions named as legatees in the eleventh paragraph of said will are educational or charitable corporations organized under the laws of the State of New York and located in New York State.

22. The nature of the Society for Ethical Culture, incorporated under the laws of the State of New York, and the Ethical Culture School mentioned in the fourteenth paragraph of the will and the purpose to which the residuary gift made by the said fourteenth paragraph will be devoted are correctly set forth in detail in affidavits of Abraham L. Gutman and Robert D. Kohn, copies of which affidavits are submitted herewith marked Exhibits L and M respectively.

23. On the 1st day of September, 1925, the executors filed in the Probate Court for the District of Stamford and with the Tax Commissioner a statement under oath covering the property of said estate and the claimed deductions therefrom for the purpose of determining the succession tax, if any, due the State of Connecticut from said Estate.

24. Thereafter the Tax Commissioner of the State of Connecticut made a computation of the claimed succession tax due to the State of Connecticut from said estate and filed a copy of said computation with the Probate Court for the District of Stamford on the 15th day of September, 1925. A copy of said computation is annexed hereto marked Exhibit N.

25. Thereafter a hearing was held for the determination by the Probate Court for the District of Stamford of the amount of the succession tax due to the State of Connecticut from said estate, at which hearing the Tax Commissioner appeared by Farwell Knapp, his attorney, and the executors appeared by their attorneys and made objection to the determination of said tax at the amount computed [fol. 24] by the Tax Commissioner, $188,780.58, claiming that the interest in said partnership, the bonds listed in Exhibit A and the stock listed in Exhibit B other than such as were issued by Connecticut residents and corporations, are tangible property and located without the state of Connecticut at the death of the decedent, and were not subject to the jurisdiction of the State of Connecticut, and any attempt by the State of Connecticut to tax the transfer thereof other than the stock of Connecticut residents and corporations constituted the taking of property without due process of law in violation of the Federal Constitution; that even if said partnership interest and said bonds and stocks, or any of them, are considered to be intangible property, nevertheless they and the miscellaneous property due from non-residents of the State of Connecticut were not within the jurisdiction of the State of Connecticut for the purpose of taxation, and the taxation of the transfer thereof constituted the taking of property without due process of law in violation of the Federal Constitution; that the transfer of all the partnership interest and the bonds and stock aforesaid took place under and by virtue of the laws of the State of New York and the authority conferred upon

the Surrogates Court of New York County by such laws, and without any right, intervention or power in relation thereto vested in or exercised by the Probate Court for the District of Stamford or by the State of Connecticut, and any attempt by said Probate Court for the District of Stamford or by the State of Connecticut to assert jurisdiction or authority in relation to the said transfer amounts to a failure to give full faith and credit to the laws of the State of New York conferring jurisdiction and power upon the said Surrogate's Court and relating to the said transfer and that it accordingly is in violation of the Federal Constitution; and that the gifts made by the will of the decedent to educational and charitable corporations in New York and to trustees for the benefit of the Ethical Culture Society a charitable and religious corporation organized in New York, are, within the reasonable meaning of the Connecticut statute, exempt from succession tax thereon.

26. On December 4, 1925, the Probate Court for the District of Stamford made an order and decree approving the computation of succession tax due the State of Connecticut from the estate of decedent, filed in said Court by William [fol. 25] H. Blodgett on September 15, 1925, and ordering that the total amount of said tax be $188,780.58 as fixed by the computation of the Tax Commissioner filed as aforesaid, and directing the executors to pay the amount of said tax to the Treasurer of the State of Connecticut and exhibit to the Probate Court for the District of Stamford a proper receipt therefor.

27. On the 28th day of December, 1925, said executors, the plaintiffs in this action, took an appeal from said order and decree of said Probate Court for the District of Stamford next above referred to, and filed a bond pursuant to law to prosecute said appeal to effect.

28. On the 10th day of January, 1926, the plaintiffs filed in the Superior Court for the County of Fairfield, a statement of reasons of appeal, a copy of which is hereto annexed, marked Exhibit O.

29. Reference in detail to any of the Statutes of the State of New York, or to any of the decisions of the courts of record of said State, in so far as applicable to the issues of the case, may be made by either party in this proceeding

without formal proof thereof, and are herewith made part of this stipulation for the purposes of the record.

The parties hereto respectfully represent to the Court that the questions of law involved are as follows:

Questions of Law

1. Was the decedent's interest in the partnership at the time of his death, for the purpose of the Connecticut succession tax, to be treated as consisting of specific items of partnership property?

2. Was the decedent's interest in the partnership of William Openhym & Sons subject, in whole or in part, to the Connecticut succession tax?

3. If decedent's interest in said partnership consisted of specific items of partnership property, was any or were all of the following classes of property owned by the partnership subject to the Connecticut succession tax:

[fol. 26] (a) Real estate physically situated in New York.

(b) Merchandise, furniture and fixtures, physically situated in New York.

(c) Cash in partnership office in New York.

(d) Deposits in New York and foreign banks.

(e) Trade acceptances and notes and loans receivable, the physical evidences of the obligations thereof being physically situated in New York, and none of which were due from Connecticut residents or corporations.

(f) Advances to consignors secured by merchandise physically situated in New York, none of which advances were due from Connecticut residents or corporations.

(g) United States Liberty bonds physically situated in New York.

(h) Bonds of corporations not incorporated under the laws of the State of Connecticut, the bonds being physically situated in New York.

(i) Certificates of shares of stock of corporations not incorporated under the laws of the State of Connecticut, the certificates being physically situated in New York.

(j) Prepaid expenses and advances to travelers, none of which were due from Connecticut residents or corporations.

4. Were the United States Liberty Bonds mentioned in Exhibit A hereto annexed, and constituting a part of the "partner's investments" held by the partnership, referred to in paragraph 10 of the stipulation of facts, and physically situated in the State of New York at the time of the decedent's death, subject to the Connecticut succession tax?

5. Were Treasury certificates mentioned in Exhibit A hereto annexed, and constituting a part of the "partner's investment" held by the partnership, referred to in paragraph 10 of the foregoing stipulation of facts, and physically situated in the State of New York at the time of the decedent's death, subject to the Connecticut succession tax?

[fol. 27] 6. Were the stocks of corporations not organized under the laws of the State of Connecticut, which stocks constituted a part of the "partner's investments" referred to in paragraph 10 of the foregong stipulation of facts, the certificates of which were physically situated in the State of New York at the time of the decedent's death, subject to the Connecticut succession tax?

7. Were stocks of Connecticut corporations owned by the testator at the time of his death, the certificates of which were physically situated in New York State, subject to the Connecticut succession tax?

8. Were the deposits in banking institutions not situated in the State of Connecticut owned by the decedent at the time of his death, subject to the Connecticut succession tax?

9. Were the proceeds realized by the executors from a policy of life insurance on the life of the testator issued by the Mutual Life Insurance Company of New York, which policy was situated in New York State at the time of the decedent's death, and which policy was payable, by its terms to the executors at the death of the insured, subject to the Connecticut succession tax?

10. Were the coins and bank notes (described as cash on hand) belonging to the decedent at the time of his death and situated at that time in the State of New York, subject to the Connecticut succession tax?

11. Is the computation of the Connecticut succession tax made by the defendant as set forth in Exhibit N correct?

12. Is the succession tax imposed by the State of Connecticut on any of the foregoing items of property belonging to the decedent at the time of his death, a taking of property without due process of law in violation of Amendment XIV of the Constitution of the United States?

13. Is the succession tax imposed by the State of Connecticut on any of the foregoing items of property belonging to the decedent at the time of his death, a failure to give full faith and credit to the laws of the State of New York conferring jurisdiction and power upon said Surrogate's [fol. 28] Court in New York County and relating to said transfer, and therefore in violation of Article IV Section 1 of the Constitution of the United States?

14. Were the gifts made by the will of the decedent to educational and charitable corporations in New York exempt from the Connecticut succession tax?

15. Was the gift to trustees for the benefit of the Ethical Culture Society, a charitable and religious corporation organized in New York, exempt from the Connecticut succession tax?

The Plaintiffs, by Cummings & Lockwood, Their Attorneys. William H. Blodgett, Tax Commissioner. Frank E. Healey, Atty. Gen. Lucius F. Robinson, by Farwell Knapp, His Attorney.

EXHIBIT A

Bonds

$300 00	First Liberty 4¼ at 102 14/32	$307 31
	Accrued int. June 15-Sept. 23/24	3 54
288,600	Second Liberty 4¼ at 101 17/32	293,019 19
	Accrued int. May 15-Sept. 23, 1924	4,463 28
67,300	Third Liberty 4¼ at 102 7/32	68,793 22
	Accrued int. Sept. 15-23/24	63 56
277,550	Fourth Liberty 4¼ at 102 18/32	233,380 97
	Accrued int. Apr. 15-Sept. 23/24	4,325 03
10,000	Treasury Certificates 1952 4¼% at 105 24/32	10,575 00
	Accrued int. Apr. 15-Sept. 23/24	190 07

[fol. 29]

$400	National Weekly Corp. 6s	No value
300	Hubbard Heights Golf Club, inc. 2nd 7% mtge. bonds at 85	255 00
	Accrued int. June 1-Sept. 23/24	6 71
300	Hubbard Heights Golf Club, inc. 3rd mtge. 7% bonds at 85	255 00
	Accrued int. July 1-Sept. 23/24	4 96
500	Stamford Women's Club, Inc. 20 year 5s due 1939	No value
		$615,642 84

EXHIBIT B

Stocks

47 shs.	Canadian Bank of Commerce at 186½ Incorporated under the laws of Canada.	$8,765 50
50 "	Alaska & Northwestern Co. Incorporated under the laws of New Jersey.	No value
25 "	America International at 26 Incorporated under the laws of New York.	650 00
100 "	Central Union Trust Co. at 630 Incorporated under the laws of New York.	63,000 00
64 "	Each of Chase National Bank and Chase Securities Co. at 368 for 1 share of each Incorporated under the laws of New York.	23,552 00
65 "	Farmers Loan and Trust Co. at 696 Incorporated under the laws of New York.	45,240 00
18 "	First National Bank of New York at 1845 (including 18 shs. First Security Co.) Incorporated under the laws of New York.	33,210 00

20 shs.	Greenwich Bank at 385 ..... Incorporated under the laws of New York.	7,700 00
[fol. 30]		
42 "	Hanover National Bank at 880 .... Incorporated under the laws of New York.	36,960 00
40 "	National City Bank of New York at 395 ..... Incorporated under the laws of New York.	15,800 00
25 "	United States Trust Co. at 1480 ... Incorporated under the laws of New York.	37,000 00
5 "	National Weekly Corp. ..... Incorporated under the laws of New York.	No value
3 "	Stamford Theatre, Inc. at 40 ..... Incorporated under the laws of Connecticut.	120 00
154 "	United Shoe Machinery Corp. at 38⅞ ..... Incorporated under the laws of New Jersey.	5,986 75
		$277,984 25

EXHIBIT C

Other Miscellaneous Property in New York

1. National City Bank of New York savings account with accrued interest to date of death	$108 56
2. Life Insurance policy, Mutual Life Insurance Company of New York payable to estate, amount realized	14,820 11
3. Cash on hand at New York	287 48
4. Lassner account receivable	2,675 52
	$17,891 67

[fol. 31] EXHIBIT D

"New York, December 1st, 1923.

Messrs. William Openhym & Sons, 95 Madison Avenue, New York City.

DEAR SIRS: I beg to confirm our understanding that any securities contributed by me to the capital of the firm and referred to in the "Special Reserve Capital Account" are to be used whenever required for the purposes of the business, though it is understood that ordinarily they shall be held as a special reserve capital for use particularly at times when general credit conditions are disturbed, and for the purpose of maintaining securely the high credit of the firm.

In lieu of interest to me on the contribution of capital represented by such securities, it is understood that I am to receive any interest and dividends which may be paid on the securities. In all respects, however, such securities are to be at the risk of the business in the same manner as all other capital contributed by me.

Yours very truly, (Signed) Robert B. Hirsch."

[fol. 32] EXHIBIT E

SURROGATE'S COURT, COUNTY OF NEW YORK

In the Matter of Proving the Last Will and Testament of ROBERT B. HIRSCH, Deceased, as a Will of Real and Personal Property

To the Surrogate's Court of the County of New York:

The petition of Arthur Silbermann, residing at #939 Park Avenue, New York, N. Y., and Abraham L. Gutman, residing at No. 166 West 87th Street, New York, N. Y., respectfully states.

That your petitioners are two of the executors named in the Last Will and Testament of Deceased.

That said Last Will and Testament, to be herewith presented and hereby offered for probate, ralates to both

real and personal property and bears date February 28, 1917, and is signed at the end thereof by the said testator and by Harry C. Hutchins, residing at 58 West 59th Street, New York, N. Y., Julius Diehl, residing at 644 Riverside-Drive, New York, N. Y., and Harry H. Sturge, 26 Prospect Place, Hempstead, L. I., as subscribing witnesses.

That there is a Codicil to the said Will, which said Codicil bears date January 22, 1918, and is signed at the end thereof by the said testator, and by Harry C. Hutchins, residing at 780 Madison Avenue, New York City, Julius Diehl, 644 Riverside Drive, New York, N. Y., and Harry H. Sturge, 26 Prospect Place, Hempstead, L. I., and that a further Codicil to said Will bears date January 23, 1919, and is signed at the end thereof by the said testator and by Harry C. Hutchins, residing at 21 West 58th Street, [fol. 33] New York, N. Y., Harry H. Sturge residing at 26 Prospect Place, Hempstead, L. I., and Charles M. Funk residing at 1054 Simpson Street, New York, N. Y.

That Petitioners do not know of any other Codicil to said Last Will and Testament, nor is there any to the best of their information and belief.

That the said deceased was at the time of his death a resident of the County of Fairfield, State of Connecticut, and died at Stamford Connecticut on the 23rd day of September 1924.

That at the time of decedent's death he left personal property exceeding in value the sum of Ten Thousand ($10,000.00) Dollars within the County and State of New York, said property consisting of negotiable bonds and stocks. Decedent was in business at No. 95 Madison Avenue, New York, N. Y.

That the names of all the heirs and all the next of kin of said testator, each person designated in the Will and Codicils herewith presented and hereby offered for probate as executor, testamentary trustee or guardian; and their residences and post office addresses are hereinafter mentioned in subdivisions, A, B, C and D hereof, as follows:

* * * * * * *

That no petition for the probate of the will herewith presented and hereby offered for probate, or for letters of

administration on said estate, has been heretofore filed in this or any other Surrogate's Court of this state.

That there is no person designated in the will and Codicil herewith presented and hereby offered for probate as executor, testamentary trustee or guardian, except as hereinbefore mentioned.

That there is no person named as executor, testamentary trustee, guardian, devise- or beneficiary in any other will of the same testator filed in the Surrogate's office of the County of New York.

That the names and post office addresses of the devisees, legatees and other beneficiaries named in the Will and Codicil herewith presented and hereby offered for probate, are as follows:

* * * * * * *

[fol. 34] That the value of the entire estate of the decedent is over Ten Thousand ($10,000.00) Dollars.

That the value of the real property in this State of which the testator died seized is No Dollars and that the value of the personal property of which said testator died possessed is over Ten Thousand ($10,000.00) Dollars.

That there are no persons interested in this proceeding other than those hereinbefore mentioned.

Wherefore your petitioner prays—

That a citation to show cause herein to the persons hereinbefore named, described and included in subdivisions, A. B, C and D hereof, citing them to show cause why the last will and testament herewith presented and hereby offered for probate should not be admitted to probate;

That an order be granted directing the service of the citation personally without the State or by publication upon the persons hereinbefore named, described and included in subdivisions A, B, C and D hereof who are not residents of the state of New York, and also upon the persons hereinbefore described and included in those subdivisions who and whose names or residences and post office addresses are unknown and cannot be ascertained; and

That the last will and testament herewith presented and hereby offered for probate may be admitted to probate as

a will of real and personal property and that letters testamentary may be issued to the executors who may qualify thereunder.

Dated, New York, October 15, 1924.

(Signed) Arthur Silbermann, Abraham L. Gutman, Petitioners.

(Verified by Arthur Silbermann and Abraham L. Gutman, October 15, 1924.)

[fol. 35] EXHIBIT F

AT A SURROGATE'S COURT HELD IN AND FOR THE COUNTY OF NEW YORK AT THE SURROGATES' OFFICE IN SAID COUNTY, ON THE 28TH DAY OF NOVEMBER, IN THE YEAR 1924

Present: Honorable James A. Foley, Surrogate.

In the Matter of Proving the Last Will and Testament and Codicils of ROBERT B. HIRSCH, Deceased

Decree Admitting Will to Probate

The citation herein having been duly issued, served, and returned, and the Surrogate having, on his own motion, appointed Joseph F. Moss, Esq., special guardian of the unknown parties to this proceeding who may be infants or incompetents, the allegations of the parties appearing having been heard, and the proofs having been duly taken by the Surrogate, among other things as to the execution of said instrument, bearing date February 28th, 1917, together with two codicils thereto bearing date January 22nd, 1918, and January 23rd, 1919, respectively, and the probate of the said Will not having been contested, and it appearing to the Surrogate that the Will was duly executed, and that the testator, at the time of executing it, was in all respects competent to make a Will and not under restraint.

It is ordered, adjudged and decreed, that the instruments offered for probate herein be and the same hereby are admitted to probate as the Last Will and Testament of the said Deceased, valid to pass real and personal property,

[fol. 36] and that letters testamentary be issued thereon to the executors who may qualify thereunder.

It is further ordered and decreed, that Joseph F. Moss, Esq., the special guardian herein, is hereby allowed One Hundred dollars for compensation for his services.

James A. Foley, Surrogate.

EXHIBIT G

The People of the State of New York, by the grace of God free and independent, to all to whom these present- shall come or whom they may concern, send greeting:

Know ye, that at the County of New York, on the 28th day of November, in the year of our Lord one thousand nine hundred and twenty-four, before Honorable John P. O'Brien, a Surrogate of our said county, the last will and testament of Robert B. Hirsch, deceased, was proved, and is now approved and allowed by us; and the said deceased having been at the time of his death a resident of Fairfield County, Conn., leaving property in the County of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testator and also the auditing, allowing and final discharging the account thereof doth belong unto us, the adminstration of all and singular goods, chattels and credits of the said deceased in any way concerning his will, is granted unto Charles Moebius of Avon-by-the-Sea, N. J.

Franklin C. Lewis, Arthur Silbermann, Abraham L. Gutman and Joseph Plaut, all of the City of New York, N. Y., executors in the said will named, they being duly sworn, well, faithfully and honestly to discharge the duties of such executors.

[fol. 37] In testimony whereof, we have caused the seal of office of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Honorable John P. O'Brien, a Surrogate of our said County of New York at said county, the 28th day of November, in the year of our Lord one thousand nine hundred and twenty-four.

Martin G. McCue, Clerk of the Surrogate's Court.

(Seal.)

Exhibit H

Surrogate's Court, County of New York

In the Matter of the Appraisal under the Transfer Tax Law of the Estate of Robert B. Hirsch, Deceased

To the Surrogate Court of the County of New York:

I, M. F. Loughman, Transfer Tax Appraiser, having been designated by Hon. John P. O'Brien, Surrogate of the County of New York, by an order duly made and entered on the 19th day of January, 1925, to appraise the estate of the above-named decedent, pursuant to the provisions of the Law relating to taxable transfers of property, and the statutory notice by mail having been duly given herein to all the persons entitled thereto as provided in Section 230 [fol.38] of the Tax Law as appears by copy of such notice and affidavit of mailing thereof hereunto annexed, and having held an appraisal on the 21st day of December, 1925, at the Office of the Transfer Tax Appraiser for the County of New York, and having heard the allegations and proofs of the parties then and there appearing before me and offering the same, and having given due consideration to the affidavits and other papers submitted herein, and having made due and careful inquiry into all the matters and things brought before me in this proceeding, do now make and file the following report:

First. I report that the decedent herein died a non-resident of the State of New York on the 23rd day of September, 1924, leaving a Last Will and Testament, copy of which is hereunto annexed, which was duly admitted to probate by the Surrogate's Court of New York County on the 28th day of November, 1924, and that thereafter on the 28th day of November, 1924, Letters Testamentary upon the estate of the said decedent were duly issued by this Court to Abraham L. Gutman, 166 West 87th Street, New York City, Arthur Silbermann, 930 Park Avenue, New York City, Charles Moebius, Avon, New Jersey, Joseph Plaut, 310 West 86th Street, New York City, Franklin C. Lewis, 5 West 65th Street, New York City, as executors.

Second. I further report the following appearances in this proceeding: Charles A. Curtin, Esq., Attorney for

State Tax Commission, 2220 West 40th Street, New York City. Shearman & Sterling, Esqs., Attorneys for Executors, 55 Wall Street, New York City. Cohen, Gutman & Richter, Esqs., Attorneys for Executors, 111 Broadway, New York City.

[fol. 39] Third. I further report that I appraised the estate of the above named non-resident decedent, at its fair market value as of the 23rd day of September, 1924, the date of decedent's death, subject to tax in this proceeding, pursuant to Section 221-c, as follows:

List of Items Taxable in New York

25	shares	American International Corp. at 27	$675 00
100	"	Central Union Trust Co. of New York, at 630	63,000 00
64	"	Chase Securities at 363	23,232 00
64	"	Chase National Bank	
65	"	Farmers Loan & Trust Co., at 695	45,175 00
18	"	First National Bank of New York	33,435 00
18	"	First Security Co., at 1867½	
42	"	Hanover National Bank at 880	36,960 00
40	"	National City Bank of New York	15,720 00
40	"	National City Co., at 393	
25	"	United States Trust Co. of New York, at 1475	36,875 00
		Partnership interest in William Openhym & Sons	1,683,269 56
			$1,938,341 56

Deductions

Funeral expenses, etc., $180,137.91, pro rated at .7539802 to	135,820 42
Net New York estate	$1,802,521 14

Fourth. I further report all the beneficiaries as entitled at the time of decedent's death to an interest in this estate pursuant to the provisions of the said decedent's last will and testament, the relationship of such persons to decedent,

the amount of the share or interest of each, and whether such share or interest is taxable in this proceeding, to be as hereinafter set forth:

[fol. 40]

Beneficiaries		Amount of *in* interest in New York estate	Exemption	Taxable
Harriet O. Lassner (not related):				
Life estate in	$300,000.			
Present Value	$163,575.			
Pro rated to		$123,332.31	0	123,332.31
Remainder	$136,425.00			
Pro rated to	$102,861.75			
Passes as below.				
Marcelle Humbert (second cousin):				
Life estate in	$12,500			
Present value	$9,047.90			
Pro rated to		6,821.26	0	6,821.26
Remainder	$3,453.49			
Pro rated to	$2,603.49			
Passes as below.				
Laure Choffin (second cousin):				
Life estate in	$12,500			
Present value	$8,353.00			
Pro rated to		6,298.00	0	6,298.00
Remainder	$4,147.00			
Pro rated to	$3,126.75			
Passes as below.				
Gustave Hirsch (first cousin):				
Legacy of	$5,000.00			
Pro rated to		3,769.90	0	3,769.90
Eugene Hirsch (first cousin):				
Legacy	$5,000			
Pro rated to		3,769.90	0	3,769.90
[fol. 41] Nora Ullman (first cousin):				
Legacy of	$5,000.00			
Pro rated to		3,769.90	0	3,769.90
Lotta O. Rouff (not related):				
Life estate in	$10,000			
Present value	$6,066.00			
Pro rated to		4,573.64	0	4,573.64
Remainder	$3,934.00			
Pro rated to	$2,966.16			
Passes as below.				
Josephine Thellian (not related):				
Life estate in	$10,000			
Present value	$5,185.00			
Pro rated to		3,909.39	0	3,909.39
Remainder	$4,815.00			
Pro rated to	$3,630.41			
Passes to residue.				
Hudson Guild:				
Legacy of	$25,000.00			
Pro rated to		18,849.51	$18,849.51	0
Cooper Union for the Advancement of Science and Art:				
Legacy of	$20,000.00			
Pro rated to		15,079.50	15,079.50	0

Beneficiaries		Amount of *in* interest in New York estate	Exemption	Taxable
Educational Alliance:				
Legacy of	$10,000.00			
Pro rated to		7,539.80	7,539.80	0
[fol. 42] Hebrew Technical Institute for Boys:				
Legacy of	$10,000.			
Pro rated to		7,539.80	7,539.80	0
Hebrew Technical Institute for Girls:				
Legacy of	$10,000.00			
Pro rated to		7,539.80	7,539.80	0
Lilly Oppenheimer (not related):				
Life estate in	$25,000.			
Present value	$14,577.			
Pro rated to		10,990.77	0	10,990.77
Remainder	$10,423.00			
Pro rated to	$7,858.74			
Passes to residue.				
Franklin C. Lewis (not related):				
Legacy of	$15,000.00			
Pro rated to		11,309.71	0	11,309.71
E. L. Blun (not related):				
Legacy of	$1,500.00			
Pro rated to		1,130.98	0	1,130.98
J. Bernard (not related):				
Legacy of	$965.00			
Pro rated to		727.59	0	727.59
J. Dempsey (not related):				
Legacy of	$1,200.00			
Pro rated to		904.76	0	904.76
[fol. 43] G. B. Downer (not related):				
Legacy of	$700.00			
Pro rated to		527.79	0	527.79
W. Drake (not related):				
Legacy of	$800.00			
Pro rated to		603.18	0	603.18
A. Fyfe (not related):				
Legacy of	$900.00			
Pro rated to		678.58	0	678.58
A. L. Golsch (not related):				
Legacy of	$800.00			
Pro rated to		603.18	0	603.18
H. C. Hutchins (not related):				
Legacy of	$2,000.00			
Pro rated to		1,507.98	0	150,7.98
H. L. Larrabee (not related):				
Legacy of	$1,350.00			
Pro rated to		1,017.87	0	1,017.87
E. P. Leonard (not related):				
Legacy of	$1,350.00			
Pro rated to		1,017.87	0	1,017.87
L. J. Levy (not related):				
Legacy of	$1,000.00			
Pro rated to		753.98	0	753.98
C. Moebius (not related):				
Legacy of	$1,000.00			
Pro rated to		753.98	0	753.98
[fol. 44] E. Maxon (not related):				
Legacy of	$1,300.00			
Pro rated to		980.17	0	980.17
B. E. Marks (not related):				
Legacy of	$1,125.00			
Pro rated to		848.22	0	848.22

Beneficiaries		Amount of *in* interest in New York estate	Exemption	Taxable
P. Reid (not related):				
Legacy of	$750.00			
Pro rated to		565.49	0	565.49
J. C. Strong (not related):				
Legacy of	$700.00			
Pro rated to		527.79	0	527.79
R. M. Wood (not related):				
Legacy of	$900.00			
Pro rated to		678.58	0	678.58
J. Wolf (not related):				
Legacy of	$750.00			
Pro rated to		565.49	0	565.49
Executors, for benefit of forty beneficiaries of the 5% class:				
Total legacies	$13,905.70			
The pro rated amount of each legacy being less than $500.00 total amount of pro rated legacies		$10,484.61	$10,484.61	0
Josephine W. French (not related):				
Legacy of	$20,000.00			
Pro rated to		15,079.60	0	15,079.60
[fol. 45] Ethel C. Bratton (no relation):				
Legacy of	$15,000.00			
Pro rated to		11,309.71	0	11,309.71
Alice M. Paine (not related):				
Legacy of	$10,000.00			
Pro rated to		7,539.80	0	7,539.80
Irwin A. Oppenheimer (not related):				
Life estate in	$20,000.00			
Present value	11,164.00			
Pro rated to		8,417.43	0	8,417.43
Remainder	$8,836.00			
Pro rated to	$6,662.17			
Passes to residue.				
Executors, for benefit of a person of the 5% class: Remainder after life estate of Harriet O. Lassner		102,861.75	0	102,861.75
Executors, for benefit of a person of the 5% class: Remainder after life estate of Marcelle Humbert		2,603.49	0	2,603.49
Executors, for the benefit of a person of the 5% class: Remainder after life estate of Laure Choffin		3,126.76	0	3,126.76
Executors, for the benefit of a person of the 5% class: Remainder after life estate of Lotto O. Rouff		2,966.16	0	2,966.16
[fol. 46] Trustees, for the benefit of the Society for Ethical Culture: Residue		$1,388,645.06	$1,388,645.06	0

Respectfully submitted.

M. F. Loughlin, Appraiser.

Dated New York, N. Y., Dec. 31, 1925.

Exhibit I

At a Surrogate's Court Held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, City of New York, on the 6th day of January, 1926

Present: Hon. John P. O'Brien, Surrogate.

In the Matter of the Transfer Tax upon the Estate of Robert B. Hirsch, Deceased

Order Assessing Tax

On reading the report filed on the 31st day of December 1925, of M. F. Loughman, Esq., the appraiser appointed by order of this court dated the 19th day of January, 1925, and it appearing that the said decedent died on the 23rd day of September, 1924, it is

[fol. 47] Ordered and adjudged that the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the act relating to taxable transfers and the tax to which the transfers are liable are as follows:

Beneficiaries	Amount received	Amount of exemption	Taxable amount	Tax assessed
Harriet O. Lassner	$123,332.31	0	$123,332.31	$7,383.26
Marcelle Humbert	6,821.26	0	6,821.26	341.06
Laure Choffin	6,298.00	0	6,298.00	314.90
Gustave Hirsch	3,769.90	0	3,769.90	188.50
Eugene Hirsch	3,769.90	0	3,769.90	188.50
Nora Ullman	3,769.90	0	3,769.90	188.50
Lotta O. Rouff	4,573.64	0	4,573.64	228.68
Josephine Thellian	3,909.39	0	3,909.39	195.47
Lillie Oppenheimer	10,990.77	0	10,990.77	549.54
Franklin C. Lewis	11,309.71	0	11,309.71	565.49
E. L. Blun	1,130.98	0	1,130.98	56.55
J. Bernard	727.59	0	727.59	36.38
J. Dempsey	904.76	0	904.76	45.24
G. B. Downer	527.79	0	527.79	26.39
W. Drake	603.18	0	603.18	30.16
A. Fyfe	678.58	0	678.58	33.93
A. L. Golsch	603.18	0	603.18	30.16
H. G. Hutchins	1,507.98	0	1,507.98	75.40
H. L. Larrabee	1,017.87	0	1,017.87	50.89
E. P. Leonard	1,017.87	0	1,017.87	50.89
L. J. Levy	753.98	0	753.98	37.70
C. Moebius	753.98	0	753.98	37.70
E. Maxon	980.17	0	980.17	49.01

Beneficiaries	Amount received	Amount of exemption	Taxable amount	Tax assessed
B. E. Marks	848.22	0	848.22	42.41
P. Reid	565.49	0	565.49	28.27
J. C. Strong	527.79	0	527.79	26.39
B. M. Wood	678.58	0	678.58	33.93
J. Wolf	565.49	0	565.49	28.27
Josephine W. French	15,079.60	0	15,079.60	753.98
Ethel C. Bratton	11,309.71	0	11,309.71	565.49
Alice M. Paine	7,539.80	0	7,539.80	376.99
Irwin A. Oppenheimer	8,417.43	0	8,417.43	420.87
[fol. 48] Executors for benefit of a person of the 5% class, remainder after life estate of Harriet O. Lassner	102,861.75	0	102,861.75	5,950.32
Executors for benefit of a person of the 5% class, remainder after life estate of Marcelle Humbert	2,603.49	0	2,603.49	130.17
Executors for benefit of a person of the 5% class, remainder after life estate of Laure Choffin	3,126.76	0	3,126.76	156.34
Executors for benefit of a person of the 5% class, remainder after life estate of Lotta O. Rouff	2,966.16	0	2,966.16	148.31

John P. O'Brien, Surrogate.

Exhibit J

Estate of Robert B. Hirsch, Late of Stamford, in said District, Deceased

To the Court of Probate for the District of Stamford:

The undersigned, Charles Moebus, Arthur Silberman, Joseph Plaut, Franklin C. Lewis and Abraham L. Gutman, respectfully represent: That said Robert B. Hirsch was domiciled in said Stamford at the time of his decease; that he died testate on or about the 23rd day of September A. D. 1924 at Stamford, Connecticut, aged about 65 years, leaving real and personal estate.

[fol. 49] That the real estate is situated in the Town of Stamford, Connecticut, and is of the estimated value of Thirty Thousand Dollars ($30,000.00), and that the value of all the personal estate wherever situated (whether within or without this State) exceeds the sum of One Hundred Thousand Dollars ($100,000).

And that according to their best belief and knowledge the decedent never married and the next of kin and heirs at law of said deceased and the only persons other than creditors interested in said estate and in the settlement thereof none of whom (except minors or as herein stated) are under any disability or incapacity, are:— the persons named as such heirs and next of kin in the petition which forms part of the exemplified copy of the Last Will and Testament and the record of the proceedings proving and establishing the Will of said Robert B. Hirsch in the Surrogates' Court of the County of New York in the State of New York filed herewith.

And the undersigned herewith exhibit a duly authenticated and exemplified copy of the Last Will and Testament of said deceased bearing date the 28th day of February, 1917 and a codicil thereto dated the 22nd day of January, 1918 and a further codicil thereto dated the 23rd day of January 1919 and of the record of the proceedings proving and establishing the same in the Surrogates Court of New York County in the State of New York being a Court of Competent jurisdiction in said State of New York and requests this Court to order said copies to be filed and recorded that they may become a part of the files and records of this Court pursuant to the statute and the law of the State of Connecticut and that letters testamentary be granted to the executors therein named and appointed.

Dated at New York, this 30th day of December 1924.

Arthur Silbermann, Franklin C. Lewis, Joseph Plaut, Chas. Moebius, Abraham L. Gutman.

[fol. 50] State of New York,
County of New York, ss:

January 7, 1925.

Personally appeared Abraham L. Gutman and made oath to the truth of the allegations in the foregoing petition before me.

Bessie Aaronson, Notary Public, Kings County. Clerk's No. 93. Register's No. 6097. N. Y. Co. Cl'k's No. 203. Reg. No. 6167. Commission expires March 31, 1926. (Seal.)

(County Clerk's Certificate Attached.)

Exhibit K

At a Court of Probate Held at Stamford, within and for the District of Stamford, on the 15th Day of January, A. D. 1925

Present: Hon. Floyd B. Bartram, Judge.

Estate of Robert B. Hirsch, Late of Stamford, in said District, Deceased

A duly authenticated and exemplified copy of the last will and testament of said deceased, and two codicils thereto and of the record and proceedings proving and establishing the same out of this State in and by a Court of competent jurisdiction, having been duly filed and recorded in this Court, on the 15th day of January, 1925, Charles Moebius, Arthur Silbermann, Joseph Plaut, Franklin C. Lewis and Abraham L. Gutman, all of the City and State of New York, who are therein named and appointed as Executors thereof this day appeared in Court, accepted said trust, and gave bond, dated the 15th day of January 1925, in the sum of one thousand (1,000) dollars, with Harriet O. Lassner, of Stamford, Fairfield County, State of Connecticut, as surety for the faithful discharge of the duties of said trust and appointment according to law.

[fol. 51] The amount of said bond being equal to twice the amount of the debts due by said deceased as estimated by this Court, and said will directing that no bonds be required of said Executors, said bond is approved and accepted by this Court and ordered on file and record.

And Emil Berolzheimer, who is also named and appointed in said will an Executor thereof having died, this Court doth thereupon approve and grant Letters Testamentary to said Charles Moebius, Arthur Silbermann, Joseph Plaut, Franklin C. Lewis and Abraham L. Gutman as such Executors.

Floyd B. Bartram, Judge.

EXHIBIT L

STATE OF NEW YORK,
County of New York, ss:

Abraham L. Gutman, being duly affirmed, deposes and says:

I am one of the executors and trustees named in the will of Robert B. Hirsch, the above named decedent.

As the Ethical Culture School, owned and conducted by the Society for Ethical Culture, maintains free scholarships for poor children without distinction as to race, creed or religion to the extent of one-third of the pupils of said School, the trustees named in the residuary clause of said Will of Robert B. Hirsch must pay to the said Society for Ethical Culture the income of said residuary estate for the purpose described in said residuary clause, to wit:—to apply the net income of said trust fund to the free education of poor and deserving children in the Ethical Culture School, now maintained by The Society for Ethical Culture in the City of New York, or any other school carrying out the same purpose which may, at any time, be owned or maintained by or associated or affiliated with said Society for Ethical Culture, and also to the free education, maintenance and support of poor and deserving [fol. 52] young men and women who may desire to fit themselves for the career of teachers and who shall have displayed to the satisfaction of the directors of the said Society for Ethical Culture sufficient capacity for such career.

The purpose for which said Society for Ethical Culture is organized, as described in its certificate of incorporation and its amended certificate of incorporation, are set forth in the annexed affidavit of Robert D. Kohn, the President of said Society, to which deponent herewith refers.

On behalf of the executors and trustees of the will of said Robert B. Hirsch, deponent respectfully claims that said residuary estate is exempt from inheritance tax under the laws of the State of New York.

Abram L. Gutman.

Affirmed before me this 1st day of July, 1925. Wm. V. Goldberg, Notary Public, New York County. Clerk's No. 131. Register's No. 7006. Certificate filed in Kings County. Clerk's No. 2. Register's No. 7001. Certificate filed in Bronx County. Clerk's No. 35. Register's No. 2799. Commission Expires March 30, 1927.

EXHIBIT M

STATE OF NEW YORK,
County of New York, ss:

Robert D. Kohn, being duly sworn, deposes and says:

I am the President of the Society for Ethical Culture in [fol. 53] the City of New York. Said Society is the owner of the Ethical Culture School, the said school being one of the activities of the said Society. The school is not separately incorporated.

The said Society for Ethical Culture was incorporated on or about the 21st day of February, 1877, under the laws of the State of New York pursuant to an act passed April 12th, 1848, as amended by subsequent acts of the legislature. A copy of the certificate of incorporation is hereto annexed.

Said certificate of incorporation was amended by certificate filed on or about the 20th day of May, 1910, and a copy of said amended certificate of incorporation is hereto annexed.

The original certificate of incorporation provides amongst other things that the Society was organized for the purpose of mutual improvement in religious knowledge and the furtherance of religious opinion, and that the object shall be accomplished in part by a series of weekly lectures in which the principles of ethics shall be developed, propagated and advanced amongst adults, and in part by the establishment of a school or schools wherein a course of moral instruction shall be supplied for the young.

The amended certificate of incorporation above referred to, Paragraph III, provides amongst other things that "Interpreting the word religion to mean fervent devotion to the highest moral ends our Society is distinctly a religious

body." The said amended certificate provides also for the "maintenance of a meeting house or meeting houses in which the Society and its members and guests may from time to time gather for ethical culture, religious inspiration and the solemnization and celebration of marriages and other events of spiritual significance and as a civic forum for the discussion of questions of social and political ethics; said meeting house to be the home of the Sunday School of the Society and of all other associations, groups classes, clubs and unions affiliated with the Society and intending to further its spiritual and specifically educational aims."

The said certificates and by-laws of the said Society provide that one of the primary objects of the said Society is "To increase among Men the Knowledge, the Love and the Practice of the right." In accordance with the by-laws the Society maintains a public platform and elects from time to time senior leader and leaders upon whom devolve the functions of public teachers of moral, the super-[fol. 54] vision of ethical classes the solemnization of marriages, officiating at funerals, services in connection with the naming of children, and the leadership of the Sunday School. The right to solemnize marriages is granted to the said senior leader and three leaders of the Society by the statutes of the State of New York, Domestic Relations Law (Section 11, Subdivision I, amended by the laws of 1920, Chapter 231).

The said Society for Ethical Culture also engages in the following charitable and benevolent activities among others:—It conducts and maintains a fresh air home at Orange County, New York, where poor and deserving children, without distinction as to race, creed or religion, are given outings and vacations during the summer season of each year; it maintains a corps of nurses who are regularly engaged in so-called district nursing in the Borough of Manhattan, City of New York, giving aid and comfort to many poor families and assisting them in rehabilitating themselves.

The residuary estate disposed of by the will of Robert B. Hirsch, the above named testator, is bequeathed to trustees named in said will for the following purposes:—to invest the same and apply the net income thereof to the free education of poor and deserving children in the Ethical Culture

School, now maintained by The Society for Ethical Culture in the City of New York or any other school carrying out the same purposes which may, at any time, be owned or maintained by or associated or affiliated with said Society for Ethical Culture, and also to the free education, maintenance and support of poor and deserving young men and women who may desire to fit themelves for the career of teachers and who shall have displayed to the satisfaction of the directors of the said Society for Ethical Culture sufficient capacity for such career, etc.

As the Ethical Culture School, owned and conducted by said Society for Ethical Culture, maintains free scholarships for poor children without distinction as to race, creed or religion to the extent of one-third of the pupils of said school, the trustees named in said will of Robert B. Hirsch must pay to the said Society for Ethical Culture for the purpose of free schoolarships in said school above described, the income of the trust fund of said residuary clause.

[fol. 55] Deponent respectfully maintains that such payment is equivalent to a gift by the testator directly to the Society for such free scholarship purpose and that therefore, the said residuary estate is exempt from interitance tax under statutes of the State of New York.

Robert D. Kohn.

Sworn to before me this 9 day of June, 1925. Maud M. Acker, Notary Public, New York Co. County Clerk's No. 17. Register No. 7032. (Seal.)

Certificate of Incorporation of The Society for Ethical Culture

I

This instrument certifies that we, the undersigned, under and pursuant to the Act of the Legislature of the State of New York, passed on the 12th day of April, 1848, entitled "An Act for the Incorporation of Benevolent, Charitable, Scientific and Missionary Society," and the several acts amendatory thereof, and particularly the act passed by said Legislature on the 10th day of April, and the 11th day of May, 1872, amending and extending the act so as to include

societies having for their purpose mutual improvement in religious knowledge or the furtherance of religious opinion, or for any two or more combined, do associate ourselves together to form a society for the purpose hereinafter set forth.

II

The name of this Society will be The Society for Ethical Culture.

[fol. 56]

III

The object of said Society will be the mutual improvement in religious knowledge and the furtherance of religious opinion, which shall be in part accomplished by a system of weekly lectures, in which the principles of ethics shall be developed, propogated and advanced among adults, and in part by the establishment of a school or schools wherein a course of moral instructions shall be supplied for the young.

IV

The number of Trustees of said Society will be fifteen.

V

The names of the Trustees who are to manage the affairs of said Society for the first year are as follows: Joseph Seligman, Albert A. Levi, Henry Friedman, Edward Lauterback, William Byfield, Joseph Sidenberg, Max Abendheim, Max Landman, Emil Salinger, Mayer Jonasson, Jacob Settheimer, Jr., Samuel B. Speyer, Samuel A. Solomons, Julius Rosenbaum, Marcus Goldman.

VI

The principal office or place of meeting of the Society will be situated in the City of New York.

In witness whereof, we do hereunto subscribe our names this 21st day of February, 1877.

The certificate is subscribed and acknowledged by the trustees, and a consent to its filing is endorsed thereon by a Judge of the Supreme Court.

We, the undersigned, a majority of the Directors of the Society for Ethical Culture in the City of New York, a membership incorporation under Chap. 319 of the Laws of [fol. 57] 1848, as amended by Chapters 209 and 649 of Laws of 1872, desiring to extend its corporate purpose pursuant to Section 4 of the Membership Corporations Law, do hereby certify as follows:

I. The name of the corporation is the Society for Ethical Culture in the City of New York.

II. The purpose for which it was incorporated "is mutual improvement in religious knowledge and the furtherance of religious opinion which shall be accomplished by a system of weekly lectures in the principles of ethics established, developed, propogated and advanced among adults and in part by the establishment of a school or schools wherein a course of moral instruction shall be supplied for the young."

III. The purpose- to which it is desired to extend i-s corporate purposes are as follows:

"I. The furtherance of all aims, objects, purposes and basic principles of the Society as declared and reflected in its basis of Union; and the development of all proper means to that end including those particularly specified in said Basis of Union, and the maintenance and development of the existing school system of the Ethical Culture Schools. The said Basis of Union is as follows:

'I. We aim to increase among men the knowledge, the love and the practice of the right.

II. As means to this end, our Society devotes itself to the following specified objects: (1) Meetings in public at stated intervals and the maintenance of a public platform for the enforcement of recognized standards of right, the development of new and higher conceptions of duty and the quickening of the moral life. (2) Systematic moral instructions of the young founded on true pedagogic principles. (3) Promotion of continued self education among adults by forming classes and groups for study and mutual inspiration. (4) General educational reform, with main stress on the formation of character as the purpose of all

education. (5) Earnest encouragement of all practical efforts which tend to elevate the condition of the wage earners. (6) Such other specific objects as the Society may from time to time agree upon.

[fol. 58] III. Interpreting the word of religion to mean fervent devotion to the highest moral ends, our Society is distinctly a religious body. But toward religion as a confession of faith in things super-human the attitude of the Society is neutral. Neither acceptance nor denial of any theological doctrine disqualifies for membership.

IV. The supremacy of the moral end is implied as a cardinal truth in the demand for ethical culture.'

2. The maintenance of a meeting house or meeting houses in which the Society and its members and guests may from time to time gather for ethical culture, religious inspiration and the solemnization and celebration of marriages and other events of spiritual significance and as a civic forum for the discussion of questions of social and political ethics; said meeting house to be the home of the Sunday School of the Society and of all other associations, groups, classes, clubs and unions affiliated with the Society and intending to further its spiritual and specifically educational aims."

IV. Such extension has been duly authorized by a resolution adopted by the concurring vote of a majority of the members of the corporation present at a special meeting of the corporation *present at a special meeting of the corporation* duly called for that purpose as more fully appears by the certificate of the President and Secretary of the Corporation hereto annexed and filed herewith.

In witness whereof we have made, signed and executed this certificate in duplicate this 20th day of May, 1910.

Edwin R. A. Seligman, John Frankenheimer, Robert B. Hirsch, Morris Cooper, Robert D. Kohn, Abm. L. Gutman, Joseph Plaut, Arthur K. Kuhn, B. Edmund David, Julius Kaufmann, Walter H. Liebmann, Francis Hellman, Julius Oppenheimer, Leo. G. Rosenblatt, Julius Henry Cohn, Alexander H. Bing, Rolfe Floyd, M. D. Rothschild.

[fol. 59] State of New York
County of New York, ss:

On this 25th day of May, 1910, before me personally came Edwin R. A. Seligman, John Frankenheimer, Robert B. Hirsch, Morris Cooper, Robert D. Kohn, Abraham L. Gutman, and on the 27th day of May 1910, before me personally came Joseph Plaut, Arthur K. Kuhn, Walter H. Liebmann, Julius Henry Cohen, Alexander M. Bing and Rolfe Floyd and on the 28th day of May, 1910, before me personally came B. Edmund David, Julius Kaufman, Francis Hellman, Julius Oppenheimer and Leo G. Rosenblatt, and on the 3-st day of May, 1910, before me personally came M. D. Rothschild to me severally known to be the persons described in and who made and signed the foregoing certificate and severally asknowledged to me that they made, signed and executed the same for the purpose herein set forth.

E. Falk, Notary Public, N. Y. County.

Exhibit N

E-16 10M 12-18-24

State of Connecticut

[Seal]

Inheritance and Succession Tax

Estate of Robert B. Hirsch

To the Court of Probate for the District of Stamford:

The subscriber, William H. Blodgett, Tax Commissioner of the State of Connecticut, a person interested in said estate, represents that he has prepared the attached computation of said inheritance and succession tax and that he has sent a copy of said computation and of this application [fol. 60] to the executors addressed to them at Stamford, Connecticut, c/o Messrs. Cummings & Lockwood, Attorneys.

Wherefore, said applicant prays this Court to assign a time and place for a hearing upon said computation and to

assertain if any tax is due to the State of Connecticut from said estate, and if any is due, the amount thereof.

Dated this 15th day of September A. D. 1925.

William H. Blodgett, Tax Commissioner, by Farwell Knapp, Assistant Tax Commissioner.

Computation of the Succession Tax

Estate as per final appraised value of Connecticut inventory, (Schedule A Executor's Return)	$2,645,065 85	
Plus taxable additions and gains (Schedules B & C, Executor's Return)	0	
Gross taxable estate		$2,645,065 85
Deductions and losses claimed by executor (Schedules D to J inclusive Executor's Return)	$244,821 06	
Less items excluded in computation of tax (Schedule M hereof)	450 00	
Deductions allowed in computation		244,371 06
Net taxable estate		$2,400,694 79

[fol. 61] This estate passes to Classes A, B, and C as follows:

Class	Total taxable estate	Exemption	Net taxable estate		Rate	Tax
A	.....	....	.....	.....	@ 1% is $	.....
				.....	@ 2% is $	.....
				.....	@ 3% is $	.....
				.....	@ 4% is $	.....
B	.....	....	.....	.....	@ 2% is $	.....
				.....	@ 3% is $	.....
				.....	@ 4% is $	.....
				.....	@ 5% is $	.....
C	$2,400,694.79	$500	$2,400,194.79	$24,500.00	@ 5% is	$1,225.00
				$75,000.00	@ 6% is	$4,500.00
				$100,000.00	@ 7% is	$7,000.00
				$2,200,694.79	@ 8% is	$176,055.58
					Total Tax	$188,780.58

With interest at 9% per annum from ..... to ..... amount to $.....

Total amount due $188,780.58

[fol. 62] The amount of tax payable by each beneficiary is as follows:

Name of beneficiary	Value of share	Amount of tax
Class C:		
Gustave Hirsch	$5,000 00	$393 18
Eugene Hirsch	$5,000 00	393 18
Nora Ullman	$5,000 00	$395 18
Marcelle Humbert (35):		
Life use of $12,500 of which the present value is	$8,072 18	$634 76*
Issue of Marcelle Humbert:		
Remainder interest in $12,500 of which the present value is	$4,427 82	$348 19*
Laure Choffin (42):		
Life use of $12,500 of which the present value is	$7,310 61	$574 88*
Issue of Laure Choffin:		
Remainder interest in $12,500 of which the present value is	$5,189 39	$408 07*
Harriet O. Lassner (53):		
Life use of $314,820 11 of which the present value is	$145,891 54	$11,472 30*
	$45,000 00	$3,538 61
	$1,058 75	$83 26
	$243 00	$19 10
Aleen Lassner (21):		
Life use of $314,820 11 upon the death of Harriet O. Lassner of which the present value is	$84,926 00	$6,678 22*
Issue of Aleen Lassner:		
Remainder interest in $314,820.11 of which the present value is (Upon the death of Harriet Lassner and Aleen Lassner.)	$84,002 57	$6,605 61*

*Taxes payable from principal of fund.

Name of beneficiary	Value of share	Amount of tax
[fol. 63] Lotta O. Rouff (48): Life use of $10,000 of which the present value is	$5,215 77	$410 15*
Issue of Lotta O. Rouff: Remainder interest in $10,000 of which the present value is	$4,784 23	$376 21*
Josephine Thellian (55): Life use of $10,000 of which the present value is	$4,391 16	$345 30*
Hudson Guild of the City of New York	$25,000 00	$1,965 90
Cooper Union for the Advancement of Science and Art	$20,000 00	$1,572 72
Educational Alliance of the City of New York	$10,000 00	$786 36
Hebrew Technical Institute for Boys	$10,000 00	$786 36
Hebrew Technical Institute for Girls	$10,000 00	$786 36
Lilly Oppenheimer (50): Life use of $25,000 of which the present value is	$12,470 38	$980 61*
Franklin C. Lewis	$15,000 00	$1,179 54
Josephine W. French	$20,000 00	$1,572 72
Ethel C. Bratton	$15,000 00	$1,179 54
Alice M. Paine	$10,000 00	$786 36
Irwin A. Oppenheimer (52): Life use of $20,000 of which the present value is	$9,507 26	$747 61*
E. L. Blum	$1,500 00	$117 96
C. Bourns	$353 60	$27 81
R. Baiges	$327 60	$25 76
J. Bernard	$965 00	$75 88

*Taxes payable from principal of fund.

Name of beneficiary	Value of share	Amount of ta
[fol. 64] J. Brunner	$291.20	$22.90
M. Cohn	$468.00	$36.80
R. Creet	$140.40	$11.04
R. Cohn	$405.60	$31.89
J. Dempsey	$1,200.00	$94.36
G. B. Downer	$700.00	$55.05
W. Dugan	$412.50	$32.44
W. Drake	$800.00	$62.91
J. Dunn	$353.60	$27.80
H. Engels	$640.00	$50.33
W. C. Fried	$450.00	$35.39
A. Fyfe	$900.00	$70.77
T. Fallon	$450.00	$35.39
J. Foley	$377.50	$29.69
Miss L. Froelke	$260.00	$20.45
J. Gresser	$416.00	$32.71
J. Graf	$156.00	$12.27
T. Gregan	$156.00	$12.27
A. L. Golsch	$800.00	$62.91
H. C. Hutchins	$2,000.00	$157.27
C. Havens	$375.00	$29.49
J. Hogan	$148.20	$11.65
L. Hydeman	$520.00	$40.89
R. Irving	$140.40	$11.04
F. E. Kohl	$600.00	$47.18
M. Klages	$351.00	$27.60
J. Kennelly	$288.60	$22.69
H. L. Larrabee	$1,350.00	$106.16
E. P. Leonard	$1,350.00	$106.16
L. J. Levy	$1,000.00	$78.64
F. Link	$150.00	$11.80
P. Linehan	$166.40	$13.08
Miss A. C. Loue	$296.40	$23.31
C. Moebius	$1,000.00	$78.84
E. Maxon	$1,300.00	$102.23
[fol. 65] B. E. Marks	$1,125.00	$88.47
J. Moore	$364.00	$28.62
Wm. Mulker	$468.00	$36.80
Miss G. E. Morris	$440.00	$34.60
H. Mockridge	$525.00	$41.28
R. McCourt	$270.40	$21.25

Name of beneficiary	Value of share	Amount of tax
J. McMurray	$395.20	$31.07
Miss A. McCabe	$130.00	$10.21
K. Ryan	$416.00	$32.70
Wm. Rolph	$384.80	$30.25
P. Reid	$750.00	$58.98
J. C. Strong	$700.00	$55.04
C. Schiapello	$200.00	$15.73
R. M. Wood	$900.00	$70.77
A. L. Wertheimer	$600.00	$47.18
Wm. Waldyer	$375.00	$29.49
J. Wolf	$750.00	$58.98
J. Wartel	$300.00	$23.59
R. Wahl	$343.20	$26.99
Ethical Culture School	$1,795,208.53	$141,167.69
Total		$188,780.58

Schedule M

Items Excluded in Computation

The following items returned in the statement under oath are excluded from the deductions claimed against the gross taxable estate because they are not comprehended under the provisions of the succession tax statutes as proper deductions in arriving at the net taxable estate.

The following item is not deductible under Section 6 of Chapter 190, Public Acts of 1923.

Wages gardeners to Nov. 29, 1924	$450.00

[fol. 66] Exhibit O

Reason of Appeal

(Same as Reason of appeal filed Jan. 11, 1926 and printed on page 6 of Record.)

In Superior Court of Fairfield County, February 26, 1926

[Title omitted]

Stipulation for Reservation to Supreme Court of Errors—Filed March 3, 1926

It is hereby stipulated by all the parties to this cause appearing herein by counsel that the above entitled cause may be reserved for the advice of the Supreme Court of Errors upon the statement of facts set forth in the stipulation dated February 26th, 1926, and on file in said cause, and upon the questions of law set forth in said stipulation as filed. And further that the present determination of the above questions of law will be in the interest of simplicity, directness and economy in judicial action because the facts agreed upon as set forth in said stipulation are all the facts in the above entitled action, and the determination of the questions of law set forth in said stipulation will be a final determination of said cause.

For the reasons above stated, the parties hereby request that the questions above set forth be reserved for the advice of the Supreme Court of Errors.

Arthur Silberman, Charles Moebius, Joseph Plaut, Franklin C. Lewis, and Abraham L. Gutman, by Cummings & Lockwood, Their Attorneys. William H. Blodgett, Tax Commissioner, by Frank E. Healy, Atty. Gen.; Lucius F. Robinson, Farwell Knapp, His Attorneys.

[File endorsement omitted.]

[fol. 66½] In Superior Court of Fairfield County, May 7, 1926

[Title omitted]

Amendment to Stipulation—Filed May 11, 1926

The parties to the above entitled action hereby stipulate that the United States Liberty Bonds and Treasury certificates referred to in Exhibit "A" on page 28 of the printed

record, and also those referred to in subdivision L of paragraph 9 on page 12 of the printed record, were not registered at the time of Robert B. Hirsch's death.

Plaintiffs, by Cummings & Lockwood, Their Attorneys. William H. Blodgett, Tax Commissioner, by Frank E. Healy, Atty. Gen.; Farwell Knapp, Inheritance Tax Attorney, Lucius F. Robinson, His Attorneys.

[File endorsement omitted.]

[fol. 67] In Superior Court of Fairfield County, February 26, 1926

Reservation—Filed March 3, 1926

At the request and by the consent of the parties to this action appearing by counsel, the Court reserves the questions of law which said parties have raised, as appears in the pleadings and by the stipulation on file, for the advice of the Supreme Court of Errors to be holden at Bridgeport within and for the Third Judicial District on the 2nd Tuesday of April, 1926, as to what judgment, decree or decision should be made or rendered thereon by this Court.

Nickerson, Judge.

[File endorsement omitted.]

[fols. 68 & 69] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 70] In Supreme Court of Errors of Connecticut

Appeal of Silberman et al.

Appeal from Superior Court, Fairfield County, Leonard J. Nickerson, Judge

Opinion—October 18, 1926

In the matter of the estate of Robert B. Hirsch. From an order and decree of the probate court determining the

inheritance or succession tax due the state and approving the computation of William H. Blodgett, Tax Commissioner, Arthur Silberman and others, executors, appealed to the superior court, which reserved the case. Superior court advised in accordance with opinion.

Robert B. Hirsch died on September 23, 1924, domiciled at Stamford, leaving a will and two codicils thereto, duly [fol. 71] executed in accordance with the law of both the states of New York and Connecticut. The plaintiffs are the surviving executors of the will. The decedent left real estate, chattels, cattle, horses, and poultry in Connecticut: also a debt due from a resident of Connecticut and a certificate of stock in a Connecticut corporation. Plaintiffs concede the right of Connecticut to tax the transfer of these, aggregating at inventory appraisal $49,097.27. The great bulk of the decedent's estate consisted of his interest in the partnership of William Openhym & Sons, appraised at $1,687,245.34, and organized and doing business in New York City under the New York limited partnership act; (2) certificates of stock in New York, New Jersey, and Canada corporations appraised at $277,864.25; (3) bonds and treasury certificates of the United States appraised at $615,121.17, and a bond due from Connecticut residents or corporations appraised at $521.67; (4) a savings bank account in New York; (5) a life insurance policy in the Mutual Life Insurance Company of New York payable to the estate; and (6) cash in New York City. All of these bonds and certificates of stock were at the time of decedent's death, and for a long time prior thereto had been, physically located in safe deposit boxes in New York City. The partnership assets consisted of real estate located in New York and also Connecticut, merchandise, chattels, credits, United States bonds, and other personal property.

The testator bequeathed the larger part of his estate to charitable and educational corporations organized under the laws of New York state and located therein. The executors offered the will and codicils for probate prior to their offer in Connecticut; they were admitted to probate in the Surrogate's Court in the county of New York, and thereafter the executors proceeded in the settlement of the estate

in New York. They have paid from the funds of the estate legacies provided in the will and codicils amounting to $299,297.45. They have also paid the debts, the federal estate tax, and the New York transfer or inheritance tax, which amounted to $19,166.04. The transfer tax report exempted the legacies bequeathed to charities and educational institutions in accordance with the New York law. The executors have also paid to the trustees named in the will and codicils the amounts therein mentioned for the benefit of certain designated individuals. The executors sold the stocks standing in the name of the testator and made the transfer of the same to the purchasers upon exhibiting to the transfer agents of the stock letters testamentary issued by the Surrogate's Court in New York, and upon like exhibition, together with proof of claim and certificate of death, and the Mutual Life Insurance Company paid to the executors the proceeds of the policy issued to decedent by it. And upon a like exhibition to the National City Bank of New York City, it paid to the executors the money on deposit therein to the credit of the decedent at the date of his death.

Thereafter, on January 8, 1925, the executors exhibited to the court of probate for the district of Stamford an exemplified copy of the will and codicils of the decedent and of the record of the proceedings proving and establishing the same in the Surrogate's Court of New York county, and on January 15, 1925, the court approved and accepted a bond in the sum of $1,000 conditioned that the executors should well and faithfully discharge their duties according to law, and issued to them letter testamentary, made an order limiting a time for the presentation of claims and directing the filing of an inventory of all the property including choses in action of the estate of the decedent, and appointed appraisers, who made and filed an inventory of all the items of property belonging to the decedent at the time of his death.

On September 1, 1925, the executors filed in the probate court for the district of Stamford and with the tax commissioner for Connecticut, a statement under oath covering the property of the estate and the claimed deductions therefrom, for the purpose of determining the succession tax, if any, due the state of Connecticut. Thereafter the tax

commissioner filed a copy of his computation of this tax with the probate court, to which the attorneys for the executors made objection, but the court on December 4, 1925, made its order and decree approving the computation of $188,780.58 fixed by the tax commissioner, and directing the executors to pay such amount to the treasurer of the state of Connecticut, and exhibit to the probate court a proper receipt therefor. The plaintiff executors duly took an appeal from this order.

The questions of law upon which the parties desire the advice of this court are:

(1) Was the decedent's interest in the partnership at the time of his death, for the purpose of the Connecticut succession tax, to be treated as consisting of specific items of partnership property?

(2) Was the decedent's interest in the partnership of William Openhym & Sons subject, in whole or in part, to the Connecticut succession tax?

(3) If decedent's interest in said partnership consisted of specific items of partnership property, was any or were all of the following classes of property owned by the partnership subject to the Connecticut succession tax:

(a) Real estate physically situated in New York.

(b) Merchandise, furniture, and fixtures physically situated in New York.

(c) Cash in partnership office in New York.

(d) Deposits in New York and foreign banks.

(e) Trade acceptances and notes and loans receivable; the physical evidences of the obligations thereof being [fol. 72] physically situated in New York, and none of which were due from Connecticut residents or corporations.

(f) Advances to consignors secured by merchandise physically situated in New York, none of which advances were due from Connecticut residents or corporations.

(g) United States Liberty bonds physically situated in New York.

(h) Bonds of corporations not incorporated under the laws of the state of Connecticut, the bonds being physically situated in New York.

(i) Certificates of shares of stock of corporations not incoporated under the laws of the state of Connecticut, the certificates being physically situated in New York.

(j) Prepaid expenses and advances to travelers, none of which were due from Connecticut residents or corporations.

(4) Were the United States Liberty bonds mentioned in Exhibit A hereto annexed, and constituting a part of the "partner's investments" held by the partnership, referred to in paragraph 10 of the stipulation of facts, and physically situated in the state of New York at the time of the decedent's death, subject to the Connecticut succession tax?

(5) Were the treasury certificates mentioned in Exhibit A hereto annexed, and constituting a part of the "partner's investments" held by the partnership, referred to in paragraph 10 of the foregoing stipulation of facts and physically situated in the state of New York at the time of the decedent's death, subject to the Connecticut succession tax?

(6) Were the stocks of corporations not organized under the laws of the state of Connecticut, which stocks constituted a part of the "partner's investments" referred to in paragraph 10 of the foregoing stipulation of facts, the certificates of which were physically situated in the state of New York at the time of the decedent's death, subject to the Connecticut succession tax?

(7) Were stocks of Connecticut corporations owned by the testator at the time of his death, the certificates of which were physically situated in New York state, subject to the Connecticut succession tax?

(8) Were the deposits in banking institutions not situated in the state of Connecticut, owned by the decedent at the time of his death, subject to the Connecticut succession tax?

(9) Were the proceeds realized by the executors from a policy of life insurance on the life of the testator issued by the Mutual Life Insurance Company of New York, which policy was situated in New York state at the time of the decedent's death, and which policy was payable, by its terms, to the executors at the death of the insured, subject to the Connecticut succession tax?

(10) Were the coins and bank notes (described as cash on hand) belonging to the decedent at the time of his death and situated at that time in the state of New York, subject to the Connecticut succession tax?

(11) Is the computation of the Connecticut succession tax made by the defendant as set forth in Exhibit N correct?

(12) Is the succession tax imposed by the state of Connecticut on any of the foregoing items of property belonging to the decedent at the time of his death a taking of property without due process of law in violation of Amendment 14 of the Constitution of the United States?

(13) Is the succession tax imposed by the state of Connecticut on any of the foregoing items of property belonging to the decedent at the time of his death a failure to give full faith and credit to the laws of the state of New York conferring jurisdiction and power upon said Surrogate's Court in New York county, and relating to said transfer, and therefore in violation of article 4 of section 1 of the Constitution of the United States?

(14) Were the gifts made by the will of the decedent to educational and charitable corporations in New York exempt from the Connecticut succession tax?

(15) Was the gift to trustees for the benefit of the Ethical Culture Society, a charitable and religious corporation organized in New York, exempt from the Connecticut succession tax?

Argued before Wheeler, C. J., and Curtis, Maltbie, Haines, and Hinman, JJ.

Abraham L. Gutman, of New York City, Charles D. Lockwood, of Stamford, Kenneth Dayton, of New York City, and Walter N. Maguire, of Stamford, for appellants.

Lucius F. Robinson and Farwell Knapp, Inheritance Tax Atty., both of Hartford, and Frank E. Healy, Atty. Gen., for appellee.

Wheeler, C. J. (after stating the facts as above):

The questions of law upon which our advice is requested under the facts as stipulated concern the order and decree

of the probate court for the district of Stamford approving the succession or inheritance tax as computed by the tax commissioner of Connecticut, and ordering the executors to pay the same to the treasurer of the state of Connecticut. Most of the items upon which the tax was imposed were intangible personal property; as to a few items tangible personal property.

[1] Our present succession act, chapter 190 of the Public Acts of 1923, does not differ in material degree from our earlier succession acts; the decisions under the earlier acts are therefore equally applicable to the act of 1923. It is "not a tax upon property, but upon the right or privilege of succession to the property of a decedent." Corbin v. Townshend, 92 Conn. 501, 503, 103 A. 647, 648. Our act specifically includes every beneficial interest of all the personal property of a domiciled decedent whether within or [fol. 73] without the state, and claims jurisdiction over all personal property for the purposes of succession to determine its descent or distribution. We interpret our act and determine that nature of this tax in Hopkins, Administrator, Appeal from Probate, 77 Conn. 644, 60 A. 657, in these words:

"The act is framed in view of the principle that personal property is bequeathed by will, and is descendible by inheritance, according to the law of the domicile, and that the disposition, distribution of, and succession to, personal property, wherever situated, is to be governed by the laws of that state where the owner had his domicile at the time of his death. * * * The right to lay such a duty is independent of the right to impose a direct tax upon all the property included in the succession, and its amount may properly depend upon a valuation of property included in the succession upon which the state could not impose a direct tax."

In further explanation of their nature and origin, we say in Warner v. Corbin, 91 Conn. 532, 536, 100 A. 354, 355:

"They are not levied, as taxes proper are, either upon property or against persons. They differ from taxes, properly speaking, in that they are exactions in the nature of death duties 'to be paid to the state upon the occasion of

death and the consequent transfer of ownership in the property of the decedent, through the intervening custody and administration of the law, to the persons designated by the law, through the statutes regulating wills, descents, and distributions.' "

The justification for the imposition of this tax upon personal property having its situs outside the jurisdiction of this state, and thus involving a power of jurisdiction in that state in respect to this tax, we state in Gallup, Treasurer, Appeal from Probate, 76 Conn. 617, at page 621, 57 A. 699, 700:

"Personal property is bequeathed by will, and is descendible by inheritance, according to the law of the domicile and not by that of its situs. Eidman v. Martinez, 184 U. S. 578, 581 [22 S. Ct. 515, 46 L. Ed. 697]. It is a settled principle of law that the disposition, distribution of, and succession to, personal property, wherever situated, is to be governed by the laws of that state where the owner had his domicile at the time of his death. Holcomb v. Phelps, 16 Conn. 127, 132. Under our law it is the duty of the administrator at the place of domicile to inventory and account for all such personal property, and that property is regarded as within the jurisdiction of the state for purposes of administration and distribution. It is true that the actual situs of such property in another state involves a power of jurisdiction in that state in respect to it for certain purposes, including the power through process of administration to appropriate so much as may be necessary to the satisfaction of claims of local creditors; but such administration is ancillary to that of the domicile, and the jurisdiction thus exercised is not in denial of, but in aid of, that exercised at the owner's domicile. This principle of law, though founded on international comity, is equally obligatory upon our courts as a legal rule of purely domestic origin. This principle is settled and unquestioned law within this state." Hopkins' Appeal, 77 Conn. 644, 655, 60 A. 657.

In Bridgeport Trust Company's Appeal, 77 Conn. 657, 60 A. 662, we held it to be the duty of the administrator to inventory personal property without the state "when its inventory is required for any ordinary purpose of administration, or when required, as it has been required by statute

since 1897, for the special purpose of enabling the court of probate to perform its statutory duty of computing the succession tax in respect to the estate in settlement." Other cases which assert and uphold the principle upon which our succession tax rests are Nettleton's Appeal, 76 Conn. 235, 56 A. 565; Bankers' Trust Co. v. Blodgett, 96 Conn. 361, 365, 114 A. 104; and Bridgeport Projectile Co. v. Bridgeport, 92 Conn. 316, 320, 102 A. 644.

[2-4] We dwell upon these familiar decisions in order to especially emphasize three features underlying our succession act, and indeed every succession act: (1) The succession to real estate within the state and personal property everywhere is governed by the law of the state of the decedent's domicile; (2) the state exercises this right in virtue of the privilege it accords to its citizens or its domiciled residents of either disposing of their property by will, or, in the event of intestacy, having it descend in accordance with the statute law of the state; (3) a succession tax is not an ad valorem tax, nor to be considered upon the same basis as that tax, it is a privilege tax, an excise tax, such as a franchise tax.

[5] The decisions and the legal literature upon this subject not infrequently fail to distinguish the succession tax as wholly apart from the ad valorem tax. The taxable situs of the former depends for its jurisdiction upon the domicile of the decedent; the latter upon the situs of the property taxed. The attempt to rest the jurisdiction of each upon the situs of property taxed requires a departure from the underlying principle of the succession tax—the right to receive from the decedent, as we hold, or as many jurisdictions hold, the right to transmit from the decedent.

It is not easy to reconcile the decisions of the Supreme Court of the United States upon this point, as well as their application; its latest utterance as applied to a transfer or inheritance tax upon shares of stock is: "The tax here is not upon property, but upon the right of succession to property." Rhode Island Hospital Trust Co., Ex'r, v. Doughton, Commissioner, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. —, 43 A. L. R. 1374. And we must assume this still to be the law of that court as applied to intangibles. It follows earlier pronouncements of that court, for example, that of Chief Justice White in Knowlton v. Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969:

[fol. 74] "Taxes of this general character are universally deemed to relate, not to property eo nomine, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. * * * Laws of this nature * * * rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. * * * Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." United States v. Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. Ed. 287; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. Ed. 1037.

The statutes of over four-fifths of the states purport to impose a transfer or succession tax upon all property of resident decedents, whether tangible or intangible, except realty located outside the state. The decisions of the states upheld these taxes, and the decisions of the United States Supreme Court as a rule sustain the state decisions. This was the condition of the law until the decision in Frick et al. v. Pennsylvania, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316, where it was held that a statute of Pennsylvania providing for a transfer tax on the succession to tangible property which had an actual situs in other states was invalid because it contravened the due process clause of the Fourteenth Amendment. Up to this time not only the state of the domicile of the decedent could impose a transfer tax upon the succession to personal property wherever located, but also the state of the situs of the property, to the measure of its value. The double taxation resulting has been unduly oppressive, and we share in the general feeling of its unfairness. Yet while following and enforcing this decision we cannot but regret its conclusion.

Donble taxation in this class of cases could have been avoided by holding that the domicile of the decedent was the only jurisdiction which could impose a succession tax upon a decedent's personal property wherever situated as well as to hold that only the state of the situs of personal property could impose such a tax. This would have been antagonistic to decided cases, just as the Frick Decision is, but it would have preserved intact the theory upon which succession taxes rest. In one particular the opinion seems to overturn a settled and established principle of probate law. It says at page 491 (45 S. Ct. 605):

"Other decisions show that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the state of its situs, and that the laws of other states have no bearing save as that state expressly or tacitly adopts them—their bearing then being attributable to such adoption and not to any force of their own."

State courts are necessarily in constant touch with probate matters and this court has held it to be the law, and we think it to be the general law, "that the disposition, distribution of, and succession to, personal property, wherever situated, is to be governed by the laws of that state where the owner had his domicile at the time of his death." Gallup, Treasurer, Appeal from Probate, supra. The foreign jurisdiction enforces the will of the decedent domiciled here, or, if he died intestate, it enforces the distribution provided by our statutes. It does this unless it shall contravene its own policy, and subject to its right to require the payment of the debts due its citizens by the decedent from the property having its situs in its jurisdiction.

The succession tax which is questioned in this case is not upon tangible property as in the Frick Case, but upon intangible property. The plaintiff seeks to apply by analogy the doctrine of that case. It must be conceded that the Frick Case did not so rule, but expressly excluded from its ruling intangible property. It said:

"The tax which it [Pennsylvania] imposes is not a property tax but one laid on the transfer of property on the death of the owner. * * * Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states. * * * Counsel for the state cite and

rely on Blackstone v. Miller, 188 U. S. 189 [23 S. Ct. 277, 47 L. Ed. 439], and Bullen v. Wisconsin, 240 U. S. 625 [36 S. Ct. 473, 60 L. Ed. 830]. Both cases related to intangible personalty, which has been regarded as on a different footing from tangible personalty."

In the latest case upon this subject, Rhode Island Hospital Trust Co., Executor, v. Doughton, Commissioner, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. —, 43 A. L. R. 1374, Chief Justice Taft says:

"In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax of course may be properly levied by the state in which he resides."

Bullen v. Wisconsin, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830, was a case where one domiciled in Wisconsin had conveyed to a trust company in Illinois certain bonds, stocks, and notes constituting a trust fund, reserving an absolute power of control over the trust. The court held that the state of the domicile of the decedent could impose an inheritance tax upon this trust fund. Mr. Justice Holmes [fol. 75] discussed the point involved in these words:

"If this fund had passed by intestate succession it would be recognized that by the traditions of our law the property is regarded as a universitas the succession to which is incident to the succession to the persona of the deceased. As the states where the property is situated, if governed by the common law, generally recognize the law of the domicile as determining the succession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicile, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock."

He cited in support of this statement Blackstone v. Miller, 188 U. S. 189, 204, 23 S. Ct. 277, 47 L. Ed. 439; Eidman v. Martinez, 184 U. S. 578, 586, 589, 590, 592, 22 S. Ct. 515, 46 L. Ed. 697; Frothingham v. Shaw, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475; and our own case, Appeal of Hopkins, 77 Conn. 644, 60 A. 657.

Ad valorem taxes upon intangible property, outside the state imposing the tax, as upon a debt, were held in State

Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. Ed. 179, to be taxable only in the state of the domicile of the creditor. "Debts," says Mr. Justice Field, "owing by corporations like debts owing by individuals, are not property of the debtors in any sense, they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed." Later, in Blackstone v. Miller, 188 U. S. 189, 23 S. Ct. 277, 47 L. Ed. 439, it was held that money of a nonresident on deposit in a bank in another state might be taxed in that state on the principle that the bank was indebted to the estate of the decedent, and the practical fact that the state of New York had power over the person of the debtor. Of this conclusion Mr. Justice Beach says, in Bridgeport Projectile Co. v. City of Bridgeport, 92 Conn. 316, 321, 102 A. 644, 646:

"Carried to its conclusion, this would authorize any credit to be taxed to the creditor at the domicile of the debtor; but, as pointed out in the opinion, the result is not to deprive the state of the creditor's domicile of its undoubted right to lay a similar tax. It simply subjects the credit to double taxation."

This broad generalization was not approved in Buck v. Beach, 206 U. S. 392, 27 S. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732, where the court said:

"We have not had a case where neither the party assessed nor the debtor was a resident of or present in the state where the tax was imposed, and where no business was done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation. We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the state."

The analysis of this and other cases referred to by Mr. Justice Holmes in Wheeler v. Sohmer, 233 U. S. 434, 34 S. Ct. 607, 58 L. Ed. 1030, as stated in the concurring opinion, was approved, and the broad doctrine announced in the opinion of Mr. Justice Holmes in that case that notes found in a foreign jurisdiction were taxable in and of themselves refuted by five of the justices, two in the dissenting and

three in the concurring opinions. Evidences of debt in the form of notes, mortgages, and other securities which are kept in the domicile of the debtor in the hands of an agent for the owner domiciled in another state and interest thereon collected and deposited for use or reinvestment in a local bank by the agent acquire a situs sometimes called a "business situs," and may be taxed in the domicile of the debtor. The leading case supporting this doctrine is New Orleans v. Stempel, 175 U. S. 309, 20 S. Ct. 110, 44 L. Ed. 174; Bristol v. Washington County, 177 U. S. 133, 20 S. Ct. 585, 44 L. Ed. 701; Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395, 27 S. Ct. 499, 51 L. Ed. 853. Under the decisions of the United States Supreme Court, intangibles have one situs for an ad valorem tax at the domicile of the creditor or owner, and one where the debt has acquired a situs by having the evidences of the debt physically within the domicile of the debtor for longer than a temporary period or used in a business there conducted for the benefit of the creditor. The doctrine of State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. Ed. 179, that intangibles have an ad valorem taxable situs at the domicile of the creditor, has never been overruled, and is the undoubted rule of law of that court. Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; Buck v. Beach, 206 U. S. 392, 401, 27 S. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732; Fidelity & Columbia Trust Co. v. City of Louisville, 245 U. S. 54, 38 S. Ct. 40, 62 L. Ed. 145, L. R. A. 1918C, 124.

[6] The law of Connecticut is in accord with these decisions. In Bridgeport Projectile Co. v. Bridgeport, 92 Conn. 316, 102 A. 644, we held that a general deposit in a commercial bank in New York by a Connecticut corporation doing business here was taxable in Connecticut upon the intangible right to repayment by check by the bank on demand. Intangibles therefore have a taxable situs at the domicile of the owner with reference to an ad valorem tax, and if any analogies may be drawn from this rule applicable to the succession tax, they must point to the same rule for each. Law writers incline to a rule taxing debts whether the tax be an ad valorem tax or a succession tax. Yet, in as strong a presentation of the subject as we have seen, the article of "Jurisdiction over Debts," by Profes-[fol. 76] sor Carpenter, in 31 Harvard Law Review, 918 we find the author states:

"In spite of principle and weighty authority in support of the taxing of debts at the debtor's domicile it still seems to be generally conceded * * * that they are taxable at the creditor's or owner's domicile."

The appellants are seeking an adjudication from this court that intangibles are taxable at the domicile of the debtor irrespective of whether the debt is there represented by specialties or used in the domicile of the debtor in the business of the creditor owner. This would be in direct variance to the decisions of the United States Supreme Court as well as of our own state.

[7] We are bound to follow these decisions regardless of whether we accede to the correctness of the rule announced by them. If we were not bound to follow these and might decide this case having regard solely to right principle, we could reach no other conclusion. Those who advocate the imposition of an inheritance or succession tax upon debts at the domicile of the debtor claim that a debt has a situs in the domicile of the debtor because that is the only place where control lies—that is, where the debt can be enforced. Three considerations weigh most strongly against this view: (1) The debt is enforceable wherever the debtor can be reached. This is seen in an action of garnishment in a state other than that of the domicile of the debtor. Harris v. Balk, 198 U. S. 215, 222, 223, 25 S. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084. The control does not necessarily lie in the state of the domicile of the debtor. Debts in and of themselves can have no locality. The right to enforce them in the domicile of the debtor is dependent upon the presence of the debtor. (2) If debts can have a locality it can only be where the parties are to whom they are due. Separate from them they can have no situs. (3) As we have said earlier in this opinion, the question of situs has no application to a succession tax. That is based upon a different theory, upon the right of transfer which exists because the domicile of the decedent gives to him the right to dispose of his property by will, or, if intestate, to have it disposed of according to the law of his domicile. The tax is not upon the decedent's property; hence there is no occasion to determine its situs. The right of transfer exists because of the domicile of the decedent.

Then these writers urge that the right to tax is given in return for the service rendered, and the only service

rendered in the case of transfer, succession, or inheritance tax is in the domicile of the debtor where the tax must be enforced. Again, there is a confusion of the ad valorem tax on property and the succession or inheritance tax. The service rendered by the state of the decedent's domicile is the granting to him of the right to dispose of his property, or to have it disposed of by law after his decease. That is the service upon which this tax rests and upon none other. The succession tax is not imposed in return for the protection given to the property or person of the decedent. The act granting the right of transfer must be within the control of the state imposing the succession tax. The fallacy in the reasoning vesting jurisdiction in the state having the control of the property with the right of transfer has resulted in confusion of thought against which Chief Justice White warned in Knowlton v. Moore, supra.

[8] The rule the executors seek to have established is that intangibles have not only a taxable situs independent of the domicile of the creditor, but also at the domicile of the debtor, and further, that this is the only situs at which they can be taxed. The proposed rule is unsupported by decision. A succession or inheritance tax imposed in the domicile of the decedent on the right of transfer is a simple and certain tax, and one easily ascertained. If in place of this the tax be imposed in the jurisdiction where the item of property has a situs, it compels a difficult determination and one which will have to be made in as many different states as the several items of intangible property of the estate are situated, involving a system fruitful in complexity, unfairness, confusion, and expense. True, double taxation of the right of transfer, in the domicile of the decedent owner, and in the domicile of the debtor, may result, but in practice it will be far less than in the proposed system of transfer taxation according to situs. Nonresident ad volorem taxes on intangible property are being gradually abolished by the enactment of reciprocal statutes designed to avoid double taxation of such kinds of intangible property. The movement will be apt to include, ere long, within its restrictions, succession or inheritance taxes. These statutes, with which our own statute, chapter 239, Public Acts 1925, must be classed, are a recognition of the principle that the only taxable situs of intangibles is at the domicile of the decedent owner.

[9] We pass to the consideration of the specific items of intangible property which in this proceeding are claimed to have been taxed under the Connecticut succession act in violation of the due process clause of the Fourteenth Amendment. The certificates of stock in the Canada, New York, and New Jersey corporations could be subjected to a transfer tax in the jurisdictions of their incorporation (Frick v. Pennsylvania, 268 U. S. 473, 497, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316; Rhode Island Hospital Trust Co., Ex'r, v. Doughton, Commissioner, 270 U. S. 69, 80, 46 S. Ct. 256, 70 L. Ed. —, 43 A. L. R. 1374), and likewise subject to a transfer tax in the domicile of the decedent. Similar taxes were sustained in Gallup's Appeal, 76 Conn. 617, 618, 57 A. 699, and Hopkins' Appeal, 77 Conn. [fol. 77] 644, 60 A. 657; Bullen v. Wisconsin, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830; Rhode Island Hospital Trust Co., Ex'r, v. Doughton, Commissioner, supra, 270 U. S. at page 80, 46 S. Ct. 256; Frothingham et al. v. Shaw, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475.

[10-12] The largest item in controversy is that arising from the succession tax computed upon decedent's interest in a partnership located and doing business in New York City. The partnership was organized under the limited Partnership Act of New York. It was subject to the law of New York in practically the same way a corporation organized under the law would have been subject. The stockholder is not the owner of the property of the corporation (Rhode Island Hospital Trust Co. v. Doughton, Commissioner, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. —, 43 A. L. R. 1374); no more is the partner the owner of the property of the limited partnership. The interest of the decedent in this partnership must be determined by the law of New York. This partnership act was, with inconsequent differences identical with the Uniform Partnership Law. Under section 52 of the New York act (Consol. Laws, c. 39), the partner's interest is personal property. And it is immaterial of what the partnership assets consist, whether reality or tangible or intangible personalty. Under section 51, the partner is a co-owner with his partners of the partnership property, holding as a tenant in partnership. His interest has been defined as a tenancy in partnership. It is not subject to dower, courtesy, or allowances to widows, heirs, or next of kin. Under section 73, where the partner

dies and the partnership continues the business, his legal representatives may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the partnership with interest. A bequest of the interest of a decedent of New York in a joint-stock association is subject to a transfer tax under chapter 215 of the Laws of New York of 1891; a similar rule must subject the share of a partner who is domiciled in New York in a limited partnership. From this it is clear that the decedent's interest in this partnership under the New York law is a right to a share in the partnership assets after its liabilities have been deducted and a balance struck. The interest is thus a chose in action, hence intangible personal property. While we have not as yet adopted the Uniform Partnership Act our law reaches the same end. Filley v. Phelps, 18 Conn. 294; Canfield v. Hard, 6 Conn. 180; Witter v. Richards, 10 Conn. 37. Gleason and Otis, Inheritance Taxation (3d Ed.) pp. 324 and 325, say:

"The interest of copartners is in the surplus after payment of debts, and is therefore intangible, even if the copartnership owns real estate." Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807.

Gleason and Otis also say:

"The interest of a nonresident in a New York partnership is taxable under the present New York statute, chapter 664, Laws 1915. The partner is to be regarded in such cases as holding only an interest in the stock or capital of the partnership, which is personal property. If the business of the firm be in operation or there be liabilities outstanding against it, the partners have not an interest in its lands or other assets that may be regarded as property, their interest is in the stock of the firm whatever upon final settlement may be due them."

The limited partnership is classed with corporations in a requirement of reports and franchise taxes. Whitney Realty Co. v. Deland, 228 Mich. 96, 199 N. W. 669; Wharf v. Wharf, 306 Ill. 79, 137 N. E. 446. Since the decedent's

interest in the New York partnership was intangible personal property, it was properly included within the computation under the Connecticut succession tax. That New York also subjected this interest to a transfer tax does not affect the validity of the Connecticut tax. Both, though resulting in double taxation, may be valid. Blackstone v. Miller, supra. Plaintiff argues that though this interest was intangible, it was of a peculiar nature making it equivalent to tangible property. We find no peculiarity in this interest—nothing approaching tangible property. Plaintiff's claim is that since the decedent's interest was inseparably connected with the interests of the other partners in the partnership, and that derived its protection from the laws of New York, and the enforcement of this interest was dependent upon the laws of New York, it is in precisely the situation of the furniture and pictures in the Frick Case. The similitude does not exist unless the decedent's interest in the partnership can be held to be tangible personal property. That cannot be done.

[13, 14] The bonds which were in New York and had long been there were United States bonds and treasury certificates, except two items of mortgage bonds, appraised at $521.67, due the decedent either from residents or corporations of Connecticut. Unquestionably Connecticut could lay a succession tax upon these mortgage bonds just as it could upon the certificate of stock in a corporation of Connecticut though the certificate had been for a long time in another jurisdiction. Bullen v. Wisconsin, 240 U. S. 625, 631, 36 S. Ct. 473, 60 L. Ed. 830; State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. Ed. 179. The United States bonds and treasury certificates are strictly speaking mere evidences of debts and intangible personalty. But state and municipal bonds which pass from hand to hand on delivery are treated as a species of tangible personal prop- [fol. 78] erty and have come to be recognized as such. In State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. Ed. 179, it is said:

"It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and

bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are."

This doctrine is cited with approval in New Orleans v. Stempel, 175 U. S. 309, 321, 20 S. Ct. 110, 44 L. Ed. 174. In Westinghouse Electric & Mfg. Co. v. Los Angeles County, 188 Cal. 491, 205 P. 1076, it is stated:

"Municipal bonds and securities of that class, which are recognized as a commodity on the market and pass from hand to hand on delivery, are commonly treated as a species of tangible property in themselves, and on this ground, have been frequently held taxable as property wherever actually located."

[15, 16] State bonds of California were held to be taxable as personal property of a non-resident in People v. Home Ins. Co., 29 Cal. 533. The same considerations which converted state and municipal securities into tangible personal property necessarily operate to convert United States bonds and treasury certificates into tangible personal property. As such under the Frick case they are subject to a transfer tax in New York where they were found and nowhere else. Likewise the cash in New York was subject to a transfer tax there and nowhere else. The proceeds of the life insurance policy, physically in New York, was not subject to the transfer tax of New York. Matter of Gordon, 186 N. Y. 471, 79 N. E. 722, 10 L. R. A. (N. S.) 1089; Inheritance Taxes, Blakemore & Bancroft (1914 Ed.) § 218. The proceeds were subject to the succession tax of Connecticut, for the right to them was vested in the decedent's estate as the creditor of the insurance company. The savings account in a bank in New York was a debt owed the decedent by the bank and subject to our succession or inheritance tax upon the same principle as was the interest in the partnership. Fidelity & Columbia Trust Co. v. City of Louisville, 245 U. S. 54, 38 S. Ct. 40, 62 L. Ed. 145, L. R. A. 1918C, 124; Bridgeport Projectile Co. v. Bridgeport, 92 Conn. 316, 102 A. 644.

[17] The executors claim that the bequests to New York charitable and educational corporations should under Connecticut law be exempt from our succession tax. No corporations of these classes are exempt under our statute then in force (section 1, c. 190, Public Acts of 1923), unless they are located within our state and receive state aid. The corporations named in these bequests are located outside our state and are not recipients of state aid. Subsequently, in chapter 47 of the Public Acts of 1925, our law was changed to include within its exemption bequests to corporations wherever situated. The decisions of this court upon which the executors rely have no application to the 1923 act.

[18] The net taxable estate upon which the computation of the tax commissioner should be made is reached by deducting from the net taxable estate $2,400,694.79, the value of the United States bonds and treasury certificates, $615,121.17, the cash in New York $287.48, together with the $19,166.04, being the transfer tax paid to the state of New York upon the stocks of corporations and the limited partnership of William Openhym & Sons, organized under the laws of the state of New York and deductible under the authority of Frick v. Pennsylvania, supra, 268 U. S. at page 497, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316, provided it had not already been deducted by the tax commissioner in fixing the net taxable estate at $2,400,694.79. Otherwise the computation as made by the tax commissioner is correct.

The superior court is advised that the questions upon which the advice of this court is desired, we answer as follows: 2, 6, 7, 8, 9, yes; 1, 4, 5, 10, 13, 14 and 15, no; 3, all; and 12, yes as to the items contained in 4, 5, and 10.

No costs will be taxed in this court in favor of any party.

In this opinion the other Judges concurred.

[fols. 79 & 79a] IN SUPREME COURT OF ERRORS OF CONNECTICUT

No. 14

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, Frank C. Lewis, and Abraham Gutman, Executors of the will of Robert B. Hirsch, late of Stamford, Fairfield County, Connecticut,

vs.

Appeal from Probate (ROBERT B. HIRSCH)

On Reservation from the Superior Court

ORDER AS TO QUESTIONS CERTIFIED

This reservation presenting questions of law which have arisen in the trial of a case, pending in the trial Court as may appear in the certified transcript of record, stipulation and reservation on file in this Court, was made by the Superior Court, for Fairfield County, on the 26th day of February, 1926 and came to this Court at its session at Bridgeport, on the second Tuesday of April, 1926; and thence by continuance by stipulation of transference to the present term, when the parties appeared and were fully heard.

Whereupon it is considered and adjudged that the said Superior Court, be and is hereby advised to answer the questions propounded as follows:

Nos. 2, 6, 7, 8, and 9 yes;

Nos. 1, 4, 5, 10, 13, 14 and 15 no; 3 all; and 12 yes, ~~except~~ as to items contained in 4, 5, and 10.

No costs to be taxed in this court in favor of either party.

By the Court.

Michael J. Flanagam, Clerk.

Judgment Oct. 18, 1926.

[fol. 80] Clerk's certificate to foregoing papers omitted in printing.

[fol. 81] In Superior Court of Fairfield County

Present: Hon. John W. Banks, Judge.

Arthur Silberman, Charles Moebius, Joseph Plaut, Franklin C. Lewis, and Abraham L Gutman, Executors, Plaintiffs,

v.

William H. Blodgett, Tax Commissioner, Defendant

Judgment—December 10, 1926

This action by appeal from the Court of Probate for the District of Stamford claiming that the plaintiffs herein were aggrieved by the order and decree of said Court of Probate allowing and approving a certain computation of inheritance and succession tax due the State of Connecticut from the estate of Robert B. Hirsch, deceased, and ordering that the total amount of said tax be the sum of $188,780.58 and that the Executors forthwith pay said amount to the Treasurer of the State of Connecticut, came to this Court on the first Tuesday of January, 1926, and thence by continuance to the 26th day of February, 1926, when, the parties having appeared and the plaintiffs having filed their reasons of said appeal as on file and the parties having agreed by stipulation as to the facts and questions of law involved as on file, said action was thereupon upon stipulation of the parties as on file reserved for the advice and direction of the Supreme Court of Errors within and for the Third Judicial District upon the questions of law as set forth in said stipulation and as to what judgment, de-
[fol. 82] cree or decision should be made or rendered thereon by this Court. Said cause having been heard before said Supreme Court of Errors and said Supreme Court of Errors having rendered its judgment as on file, said cause came to the present time when the parties were at issue, as on file.

Now, therefore, in accordance with the advice and direction of said Supreme Court of Errors, it is

Ordered, adjudged and decreed that the parties in said action be advised, in answer to the several questions propounded, as follows:

Questions 2, 6, 7, 8, 9—yes.
Questions 1, 4, 5, 10, 11, 13, 14, 15—no.
Question 3—all.
Question 12—Yes as to the items contained in questions 4, 5 and 10,

and it is further ordered, adjudged and decreed:

1. That the decedent's interest, at the time of his decease, in the partnership of William Openhym & Sons, valued at $1,687,245.34, for the purpose of the Connecticut succession tax, was not to be treated as consisting of specific items of partnership property.

2. That said decedent's interest in said partnership of William Openhym & Sons, was subject in whole to the Connecticut succession tax.

3. That the "bearer" United States Liberty Bonds, valued at $604,356.10, owned by the decedent at the time of his death and physically situated in the State of New York at said time, were not subject to the Connecticut succession tax.

4. That the "bearer" Treasury Certificates, valued at $10,765.07, owned by the decedent at the time of his death and physically situated in the State of New York at said [fol. 83] time, were not subject to the Connecticut succession tax.

5. That the stocks of corporations not organized under the laws of the State of Connecticut, valued at $277,864.25, which stocks were owned by the decedent at the time of his death, and the certificates of which were physically situated in the State of New York at said time, were subject to the Connecticut succession tax.

6. That the stocks of Connecticut corporations owned by the decedent at the time of his death, valued at $120.00, the certificates of which were physically situated in New York State at said Time, were subject to the Connecticut succession tax.

7. That the deposits in banking institutions not situated in the State of Connecticut, valued at $108.56, owned by the decedent at the time of his death, were subject to the Connecticut succession tax.

8. That the proceeds valued at $14,820.11 realized by the executors from a policy of life insurance on the life of the decedent, issued by the Mutual Life Insurance Company of New York, which policy was situated in New York State at the time of the decedent's death, and which policy was payable by its terms to the executors at the death of the insured, were subject to the Connecticut succession tax.

9. That the coins and bank notes (described as cash on hand) valued at $287.48, belonging to the decedent at the time of his death and situated at that time in the State of New York, were not subject to the Connecticut succession tax.

10. That the computation of the Connecticut succession tax made by the Tax Commissioner, was not correct.

[fols. 84 & 84a] 11. That the succession tax imposed by the State of Connecticut on the items of property belonging to the decedent at the time of his death and referred to in the foregoing paragraphs 3, 4 and 9, is a taking of property without due process of law, in violation of amendment XIV of the Constitution of the United States.

12. That the succession tax imposed by the State of Connecticut on items of property belonging to the decedent at the time of his death, other than the items referred to in the foregoing paragraphs 3, 4 and 9, is not a taking of property without due process of law in violation of amendment XIV of the Constitution of the United States.

13. That said succession tax imposed by the State of Connecticut is not a failure to give full faith and credit to the laws of the State of New York, and is not in violation of Section 1 of Article IV of the Constitution of the United States.

14. That the gifts made by the will of the decedent to educational and charitable corporations in New York were not exempt from the Connecticut succession tax.

15. That the gift to trustees for the Ethical Culture Society, a charitable and religious corporation organized in New York, was not exempt from the Connecticut succession tax; and it is further

Ordered, adjudged, and decreed that the amount of the Succession Tax due to the State of Connecticut from said estate, computed according to the advice and direction of said Supreme Court of Errors is $138,014.61 and that the executors pay to the Treasurer of the State of Connecticut said sum of $138,014.61.

Banks, Judge.

[fol. 85] In Superior Court of Fairfield County

[Title omitted]

Petition for Writ of Error—Filed Fgbruary 23, 1927

To the Hon. George W. Wheeler, Chief Justice of the Supreme Court of Errors and presiding judge of the Superior Court of the State of Connecticut:

Arthur Silbermann, Charles Moebius, Joseph Plaut, Franklin G. Lewis and Abraham L. Gutman, executors, in support of this petition, show as follows:

First. Your petitioners are the executors of the Last Will and Testament of Robert B. Hirsch, deceased.

Second. Heretofore there was conducted within the State of Connecticut a statutory proceeding for the appraisal of the estate of Robert B. Hirsch and the determination of any inheritance and succession tax which might be due thereon to the State of Connecticut, and from the appraisal and determination of William H. Blodgett, Tax Commissioner of the State of Connecticut above named, your petitioners made protest to the Probate Court for the District of Stamford, Connecticut, and on or about December 4th, 1925 the said court made an order and decree allowing and approving a computation of such tax in the sum of $188,-[fol. 86] 780.58 made by said William H. Blodgett, and ordering that such sum be paid by your petitioners to the Treasurer of the State of Connecticut.

Third. Thereafter on or about December 18th, 1925 your petitioners moved an appeal from the said order and decree to the Superior Court to be held in and for the County of Fairfield, Connecticut, and the said appeal was allowed by

order of the said Probate Court on December 28th, 1925, and on or about January 8th, 1926 your petitioners filed their reasons of appeal in the said Superior Court, Fairfield County. While the said proceeding in the Superior Court, Fairfield County, is designated an appeal from the Court of Probate, the record of the proceedings in the Court of Probate is not brought up to the said Superior Court and is no part of the subsequent proceedings because the said Court of Probate is not a court of record and because on the appeal to the Superior Court, which is a court of general jurisdiction and is a court of record, the case is tried and considered de novo and new evidence is taken and the first record made in the proceeding is that made in the Superior Court.

Fourth. On or about March 3rd, 1926 the parties filed in the Superior Court, Fairfield County, their stipulation that the said cause should be reserved for the advice of the Supreme Court of Errors upon the statement of facts and the questions of law set forth in another stipulation between the parties dated February 26th, 1926, and by order filed on or about March 3rd, 1926, made by the Hon. Leonard J. Nickerson, a judge of the said Superior Court, Fairfield County, the said questions were reserved for the advice of the said Supreme Court of Errors as to what judg-
[fol. 87] ment, decree, or decision should be made or rendered thereon by the said Superior Court. The said stipulations and reservation were in accordance with the practice in the State of Connecticut whereby a cause pending in the Superior Court in which the parties are agreed upon the facts and the issues of law may be heard in the first instance by the Supreme Court of Errors and the said Supreme Court of Errors advises the Superior Court of the correct answers to the questions of law upon the stipulated facts, and the judgment of the Superior Court is entered in accordance with such advice.

Fifth. The appeal of your petitioners and the questions of law stated in the said stipulation were argued in the Supreme Court of Errors and the said court rendered its opinion and advice to the Superior Court thereon on or about October 18th, 1926, and upon such opinion and advice and in conformity thereto the Superior Court, Fairfield County, entered judgment on or about December 10th, 1926.

It was thereby adjudged and decreed that the succession to and transfer of the interest of the decedent in the partnership of Wm. Openhym & Sons, New York City, the stocks of corporations not organized under laws of the State of Connecticut, the proceeds of a policy of life insurance issued by a New York insurance company (the certificates of such stock and the policy being physically situated in the State of New York at the time of decedent's death) and deposits in banking institutions not situated in the State of Connecticut owned by the decedent at the time of his death, all as shown and set forth in the said stipulation and reservation, were subject to the succession tax imposed by the State of Connecticut pursuant to the provisions of Chapter 190 of the Public Acts of 1923 of Connecticut, and that the [fol. 88] tax thereon imposed by such law did not constitute the taking of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and did not deny full faith and credit to the public acts, records and judicial proceedings of the State of New York in violation of Article IV, Section 1 of the Constitution of the United States, and that the said statute was not invalid for such reasons, and it was further adjudged and decreed that the executors pay to the Treasurer of the State of Connecticut the sum of $138,014.61 as succession tax, including therein a succession tax on the items of property above mentioned.

Sixth. According to the practice in the State of Connecticut above set forth the said judgment and decree so entered on December 11th, 1926 by the Superior Court, Fairfield County, upon the advice and decision of the Supreme Court of Errors, as aforesaid, is a final judgment or decree in a suit in a highest court in the State in which the decision could be had.

Seventh. The suit in which the said judgment and decree was entered was one in which the validity of a statute of the State of Connecticut was drawn in question on the ground that the said statute was repugnant to the constitution and laws of the United States, and particularly to the Fourteenth Amendment to the said Constitution, and to Section 1 of Article IV of the said Constitution, in that your petitioners alleged in the protest made to the Court of

Probate as above set forth and in their reasons of appeal filed in the Superior Court, Fairfield County, and argued before the Supreme Court of Errors (pursuant to the ques-[fol. 89] tions of law set forth in the stipulation and record in the Superior Court and in the reservation to the Supreme Court, and thereby reserved for the advice and opinion of that court) that the succession tax attempted to be levied under the provisions of Chapter 190 of the Laws of 1923 of Connecticut constituted the taking of your petitioner's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and that such action denied full faith and credit to the public acts, records and judicial proceedings of the State of New York in violation of Section 1, Article IV of the Constitution of the United States, and that the said statute of the State of Connecticut was invalid for such reasons in levying and providing for the collection of such a tax.

Eighth. The opinion and advice of the Supreme Court of Errors and the judgment and decree of the Superior Court, Fairfield County, entered thereon were in favor of the validity of the said state statute and of the succession tax attempted to be levied thereunder and overruled the objections made by your petitioners on the constitutional grounds as above set forth, and the determination of the said constitutional questions was necessary to the determination of the case, and the judgment and decree entered was based thereon.

Wherefore, because this case is one which may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error under the provisions of Section 237 of the Judicial Code your petitioners pray that a writ of error from the Supreme Court of the United States may issue to the Superior Court of the State of Connecticut, Fairfield County, for the correction of the errors so complained of and directing that a transcript of [fol. 90] the record in this case duly authenticated by the Clerk of the Superior Court of Connecticut, Fairfield County, may be sent to the Supreme Court of the United States, as provided by law and that your petitioners may

have such other and further relief in the premises as may be just and proper.

Arthur Silbermann, Charles Moebius, Joseph Plaut, Franklin G. Lewis, Abraham L. Gutman, Executors, Petitioners, by Charles D. Lockwood, Att'y; Abraham L. Gutman, Att'y.

[fol. 90a] [File endorsement omitted.]

[fol. 91] In Superior Court of Fairfield County

[Title omitted]

Assignments of Error—Filed February 23, 1927

Now come the petitioners, Authur Silbermann, Charles Moebius, Joseph Plaut, Franklin G. Lewis and Abraham L. Gutman, as executors, and show that there are errors in the record, proceedings and final judgment in the above case and file the following assignment of errors, upon which they will rely upon the prosecution of their writ of error to review the judgment and decree of the Superior Court of the State of Connecticut for Fairfield County entered on the opinion and advice of the Supreme Court of Errors in the State of Connecticut in favor of the respondent and against the petitioners:

First. The Superior Court of the State of Connecticut for Fairfield County erred in adjudging and decreeing and the Supreme Court of Errors of the State of Connecticut erred in rendering its opinion and advice upon which the said judgment was entered that Chapter 190 of the Public Acts of 1923 of the State of Connecticut was valid, and did not deprive your petitioners of their property without due process of law in violation of the Fourteenth Amendment [fol. 92] of the Constitution of the United States, in and to the extent that it imposes a succession tax upon the succession to and transfer of the interest of the decedent, Robert B. Hirsch, in the partnership of Wm. Openhym & Sons, New York City, the stocks of corporations not organized under the laws of the State of Connecticut, the proceeds of a policy of life insurance issued by a New York

insurance company (the certificates of such stock and the policy being physically situated in the State of New York at the time of decedent's death) and deposits in banking institutions not situated in the State of Connecticut owned by the decedent at the time of his death, all of which are more fully identified and described in the record in the said Superior Court.

Second. The Superior Court of the State of Connecticut for Fairfield County erred in adjudging and decreeing and the Supreme Court of Errors of the State of Connecticut erred in rendering its opinion and advice upon which the said judgment was entered, that Chapter 190 of the Public Acts of 1923 of the State of Connecticut was valid, and did not deny full faith and credit to the public acts, records and judicial proceedings of the State of New York in violation of Article 4, Section 1 of the Constitution of the United States, in imposing a succession tax upon the succession to and transfer of the interest of the decedent, Robert B. Hirsch, in the items of property mentioned and described in the first assignment of error.

Third. The Superior Court of the State of Connecticut for Fairfield County erred in adjudging and decreeing and the Supreme Court of Errors of the State of Connecticut erred in rendering its opinion and advice upon which [fol. 93] the said judgment was entered, that the tax imposed by Chapter 190 of the Public Acts of 1923 of the State of Connecticut is valid and does not deprive your petitioners of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in so far as it is a tax on the succession to and transfer of the interest of the decedent, Robert B. Hirsch, in the items of property mentioned and described in the first assignment of error.

Fourth. The Superior Court of the State of Connecticut for Fairfield County erred in adjudging and decreeing and the Supreme Court of Errors of the State of Connecticut erred in rendering its opinion and advice upon which the said judgment was entered, that the tax imposed by Chapter 190 of the Public Acts of 1923 of the State of Connecticut is valid and does not deny full faith and credit to the public acts, records and judicial proceedings of the State

of New York in violation of Article 4, Section 1 of the Constitution of the United States in so far as it is a tax upon the succession to and transfer of interest of the decendent Robert B. Hirsch in the items of property mentioned in the first assignment or error.

Fifth. The Superior Court of the State of Connecticut for Fairfield County erred in adjudging and decreeing in conformity with the opinion and advice of the Supreme Court of Errors of the State of Connecticut that your petitioners pay to the Treasurer of the State of Connecticut the sum of $138,014.61 as and for the succession tax due to the State of Connecticut pursuant to Chapter 190 of the [fol. 94] Public Acts of 1923 of the State of Connecticut, in that in so far as the said tax was imposed upon the succession to, and transfer of, the interest of the decedent Robert B. Hirsch in the items of property mentioned and described in the first assignment of error, the said judgment deprives your petitioners of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Sixth. The Supreme Court of Errors of the State of Connecticut erred in rendering its opinion and its advice to the Superior Court of the State of Connecticut for Fairfield County upon which the said judgment mentioned in the fifth assignment of error was entered, that the computation theretofore made by William H. Blodgett, Tax Commissioner of the State of Connecticut, of the succession tax upon the Estate of Robert B. Hirsch, which computation is fully set forth in the record of the said Superior Court, was valid and correct except to the extent that it included a tax upon certain bearer liberty bonds and treasury certificates and coin and bank notes more fully identified and described in the record in said Superior Court, in that by such computation, and by the judgment and decree entered by the Superior Court of the State of Connecticut for Fairfield County upon such opinion and advice, your petitioners were deprived of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Seventh. The Superior Court of the State of Connecticut for Fairfield County erred in adjudging and decreeing in

conformity with the opinion and advice of the Supreme Court of Errors of the State of Connecticut that your peti-
[fol. 95] tioners pay to the Treasurer of the State of Connecticut the sum of $138,014.61 as and for the succession tax due to the State of Connecticut pursuant to Chapter 190 of the Public Acts of 1923 of the State of Connecticut, in that in so far as the said tax was imposed upon the succession to, and transfer of, the interest of the decedent Robert B. Hirsch in the items of property mentioned and described in the first assignment of error, the said judgment denies full faith and credit to the public acts, records and judicial proceedings of the State of New York in violation of Article 4, Section 1 of the Constitution of the United States.

Eighth. The Supreme Court of Errors of the State of Connecticut erred in rendering its opinion and its advice to the Superior Court of the State of Connecticut for Fairfield County upon which the said judgment mentioned in the fifth assignment of error was entered, that the computation theretofore made by William H. Blodgett, Tax Commissioner of the State of Connecticut, of the succession tax upon the Estate of Robert B. Hirsch, which computation is fully set forth in the record in the said Superior Court, was valid and correct except to the extent that it included a tax upon certain bearer liberty bonds and treasury certificates and coin and bank notes more fully identified and described in the record in said Superior Court, in that by such computation, and by the judgment and decree entered by the Superior Court of the State of Connecticut for Fairfield County upon such opinion and advice full faith and credit is denied to the public acts, records and judicial proceedings of the State of New York in violation of Article 4, Section 1 of the Constitution of the United States.

[fol. 96] Ninth. The Superior Court of the State of Connecticut for Fairfield County erred in sustaining the order and decree of the Probate Court for the District of Stamford, Connecticut, dated December 4, 1925, allowing and approving a certain computation of the estate and inheritance tax due the State of Connecticut on the estate of Robert B. Hirsch, deceased, filed in the said court by William H. Blodgett, Tax Commissioner of the State of Connecticut, on September 15, 1925, and in sustaining the said

computation of succession tax in so far as the said order and decree and the said computation imposed a succession tax upon the succession to and transfer of the interest of the decedent, Robert B. Hirsch, in the items of property mentioned in the first assignment of error, in that the said order and decree and the said computation to that extent deprived your petitioners of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Tenth. The Superior Court of the State of Connecticut for Fairfield County erred in sustaining the order and decree of the Probate Court for the District of Stamford, Connecticut, dated December 4, 1925, allowing and approving a certain computation of the estate and inheritance tax due the State of Connecticut on the estate of Robert B. Hirsch, deceased, filed in the said court by William H. Blodgett, Tax Commissioner of the State of Connecticut, on September 15, 1925, and in sustaining the said computation of succession tax in so far as the said order and decree and the said computation imposed a succession tax upon the suc- [fol. 97] cession to and transfer of the interest of the decedent Robert B. Hirsch, in the items of property mentioned in the first assignment of error, in that the said order and decree and the said computation to that extent denies full faith and credit to the public acts, records and judicial proceedings of the State of New York in violation of Article 4, Section 1 of the Constitution of the United States.

By reason whereof your petitioners have petitioned for a Writ of Error and as plaintiffs in error pray that the said judgment and decree entered by the Superior Court of the State of Connecticut for Fairfield County on the opinion and advice of the Supreme Court of Errors in the State of Connecticut be reversed as to the foregoing matters and that judgment be entered in favor of your petitioners therefor and for costs.

Arthur Silbermann, Charles Moebius, Joseph Plaut, Franklin K. Lewis, Abraham L. Gutman, as Executors of the Estate of Robert B. Hirsch, Deceased, by Abraham L. Gutman, an Executor; Charles W. Lockwood, Atty.

Presented with the Writ of Error this 18th day of February, 1927.

George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut.

[fol. 97a] [File endorsement omitted.]

[fols. 98-99a] Bond on writ of error for $500.00 approved; omitted in printing.

[fols. 100 & 101] Return to writ of error omitted in printing.

[fol. 102] In Superior Court of Fairfield County

Writ of Error—Filed February 23, 1927

United States of America, ss:

The President of the United States of America to the Honorable the Judges of the Superior Court of the State of Connecticut, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court before you or some of you, following the advice and opinion of the Supreme Court of Errors of the State of Connecticut, the same being the highest court of law or equity of said state in which a decision could be had in the said proceeding between Arthur Silbermann, Charles Moebius, Joseph Plaut, Franklin G. Lewis and Abraham L. Gutman, as executors of the Estate of Robert B. Hirsch, deceased, and William H. Blodgett, Tax Commissioner of the State of Connecticut, wherein was drawn in question the validity of a treaty or statute of, or authority exercised under, the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under a state on the ground of their being repugnant to the constitution,

treaty or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the constitution or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened, to the great dam-
[fol. 103] age of said Arthur Silbermann, Charles Moebius Joseph Plaut, Franklin G. Lewis and Abraham L. Gutman, as executors of the Estate of Robert B. Hirsch, deceased, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court of the United States at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done, therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 18th day of February in the Year of our Lord, One thousand nine hundred and twenty-seven.

C. E. Pickett, Clerk of the District Court of the United States, District of Connecticut. (Seal.)

Allowed on February 18, 1927.

George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut.

[fol. 103a] [File endorsement omitted.]

[fol. 104] In Superior Court, Fairfield County, February 18, 1927

[Title omitted]

Judge's Certificate—Filed February 23, 1927

I, the undersigned, George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut, do hereby certify unto Honorable the Supreme Court of the United States that in the cause above named there was drawn in question the validity of a statute of the State of Connecticut, to wit: Chapter 190 of the Public Acts of 1923, on the ground that it was repugnant to the Constitution of the United States and especially to the Fourteenth Amendment to, and to Article 4, Section 1 of, the said Constitution in that the said statute in purporting to levy a succession tax on the transfer of and succession to the interest of the decedent in the partnership of Wm. Openhym & Sons, New York City, United States liberty bonds and treasury certificates payable to bearer, the stocks of corporations not organized under the laws of the State of Connecticut, the proceeds of a policy of life insurance issued by a New York insurance company, coins and banknotes described as "cash [fol. 105] on hand", (the said liberty bonds, treasury certificates, the certificates of such stock, the policy and the cash on hand all being physically situated in the State of New York at the time of decedent's death) and deposits in banking institutions not situated in the State of Connecticut, all owned by the decedent at the time of his death and more particularly set forth and described in the record in the said Superior Court, deprived the appellants, Arthur Silbermann, Charles Moebius, Joseph Plaut, Franklin G. Lewis and Abraham L. Gutman, as executors of the Estate of Robert B. Hirsch, deceased, of their property without due process of law and further denied full faith and credit to the Public acts, records and judicial proceedings of the State of New York in its purported administration and distribution of the said estate. I do further certify that the decision in the said case and the judgment entered therein

on December 10, 1926 on the advice and opinion of the Supreme Court of Errors was in favor of the validity of the said statute in and to the extent that it was decided, adjudged and decreed that the said statute did not take the property of the said executors without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States so far as it imposed a succession tax upon the succession to and transfer of the partnership interest, corporate stocks, proceeds of the life insurance policy and deposits in banking institutions above described and in that it was further decided, adjudged and decreed that it did not deny full faith and credit to the public acts, records and judicial proceedings of the State [fol. 106] of New York in violation of Article 4, Section 1 of the said Constitution of the United States, and that the said decision and judgment were against the validity of the said statute in and to the extent that it was decided, adjudged and decreed that so far as the said statute imposed a tax upon the bearer United States liberty bonds and treasury certificates and upon the coins and banknotes described as cash on hand, it constituted a violation of the Fourteenth Amendment of the Constitution of the United States.

I do further certify that according to the practice in the State of Connecticut, the judgment rendered in the Superior Court of the State of Connecticut for the County of Fairfield on December 10, 1926, upon the advice and opinion of the Supreme Court of Errors, is a final judgment and decree in the highest court of the State of Connecticut in which a decision in the suit could be had.

Dated February 18th, 1927.

George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court in the State of Connecticut.

[fol. 106a] [File endorsement omitted.]

[fols. 107-109a] Citation, in usual form, showing service on Wm. H. Blodgett, omitted in printing.

[fol. 110] In Superior Court of Fairfield County

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated by and between the attorneys for the parties in the above entitled proceeding that the papers to be transmitted to the Supreme Court of the United States by the Clerk of the Superior Court of the State of Connecticut for Fairfield County, pursuant to a writ of error allowed by the Hon. George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut, on February 18th, 1927, and issued on that day in the proceeding between the parties above mentioned are the following, and that this stipulation shall take the place of the præcipe required to be filed by counsel for the respective parties under and pursuant to Rule 9 of the Rules of the Supreme Court of the United States:

1. The printed record used in the Supreme Court of Errors on the reservation of the above case, including page 66½ thereof, the same being a stipulation dated May 7th, 1926 and filed May 11th, 1926.

2. The opinion of the Supreme Court of Errors rendered on October 18th, 1926.

[fol. 111] 3. The judgment upon such reservation of the said Supreme Court dated October 18th, 1926 answering the questions propounded in the said reservation.

4. The judgment entered by the Superior Court on December 10th, 1926 in conformity to the advice and opinion of the Supreme Court of Errors.

5. The petition for writ of error, assignment of errors, bond, writ of error and certificate by the Hon. George W. Wheeler dated February 18th, 1927 and filed with the Clerk of this court on February 23rd, 1927.

6. The citation to the respondent, William H. Blodgett, Tax Commissioner, dated February 18th, 1927, served on the respondent and his attorney on February 24th 1927 and filed with the Clerk of this court together with this stipulation.

7. The present stipulation.

It is further stipulated that the writ of error, petition for writ of error, assignment of errors, citation with acknowledgment of service and certificate by the Hon. George W. Wheeler annexed hereto are the papers so described in the paragraphs of this stipulation numbered 5 and 6 and that the copies of the printed record, opinion, judgment of the Supreme Court, judgment of the Superior Court and bond hereto annexed are true and correct copies of the said papers described in the paragraphs of this stipulation numbered 1, 2, 3, 4 and 5; that the foregoing papers together with this stipulation, constitute the complete transcript of the record to be certified to the Supreme Court of the United States at Washington, together with all of the papers used in connection with the writ of error, and that the Clerk of the Superior Court of the State of Connecticut [fols. 112 & 112a] for Fairfield County may certify this transcript of record and other papers without further formality.

Dated Hartford, Conn., February —, 1927.

Cummings & Lockwood, Attorneys for Petitioners.
Benjamin W. Alling, Attorney General of the State of Connecticut, Attorney for Respondent.

[fol. 113] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1926

No. 964

ORDER ALLOWING CERTIORARI—Filed April 18, 1927

The petition herein for a writ of certiorari to the Superior Court of Fairfield County of the State of Connecticut, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

April 18, 1927.

[fols. 114 & 115] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1926

STIPULATION TO CONSOLIDATE CASES AND TO PRINT ONLY THE RECORD IN NO. 965—Filed May 4, 1927

It is hereby stipulated and agreed between the attorneys for the respective parties hereto that the above entitled cases be consolidated, that only one record be printed, which record shall be entitled in the name of both cases, and that counsel may brief the two cases together.

Abraham L. Gutman Counsel for Arthur Silberman et al. Charles E. Hughes, Counsel for William H. Blodgett.

[fol. 116] [File endorsement omitted.]

[fol. 117] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION TO PRINT THE ENTIRE RECORD—Filed March 15, 1927

Pursuant to sub-division 9 of Rule 11 of the Rules of the Supreme Court of the United States, the plaintiffs-in-error hereby make the following statements of points on which they intend to rely in the argument of this appeal:

1. That Chapter 190 of the Public Acts of Connecticut, 1923, the judgment from which this appeal is taken and the proceedings antecedent thereto are invalid because the plaintiffs-in-error are thereby deprived of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. That Chapter 190 of the Public Acts of Connecticut, 1923, the judgment from which this appeal is taken and the proceedings antecedent thereto denied full faith and credit to the Public Acts, records and judicial proceedings of the State of New York in violation of Section 1 of Article IV of the Constitution of the United States.

Respectfully submitted.

Abraham L. Gutman, Kenneth Dayton, Attorneys for Plaintiffs-in-Error.

[fol. 118] Due and timely service of a copy of the within Statement of Points on the 10 day of March, 1927 is hereby admitted.

Farwell Knapp, Attorney for Defendant-in-Error.

[fols. 119 & 120] It is hereby stipulated by and between the attorneys for the parties to this appeal that the parts of the record which each of the attorneys think necessary for the consideration of the said appeal are the entire transcript of record and appeal papers filed with the writ of error herein, and this stipulation is filed for the purpose of complying with sub-division 9 of Rule 11 of the Rules of the Supreme Court of the United States and is in lieu of designation of the parts of the record required by said rule, and the defendant-in-error hereby waives service upon himself of the designation required by the said rule to be made by the plaintiff-in-error.

Dated: New York City, March 8th, 1927.

Abraham L. Gutman, Kennath Dayton, Attorneys for Plaintiffs-in-Error. Benjamin W. Alling, Attorney General of Connecticut; Farwell Knapp, Inheritance Tax Atty; Lucius F. Robinson, Attorneys for Defendant-in-Error.

[fol. 121] [File endorsement omitted.]

Endorsed on cover: File No. 32,532. Connecticut Superior Court. Term No. 191. Arthur Silbermann, Charles Moebius, Joseph Plaut, et al., executors, etc., plaintiffs in error, vs. William H. Blodgett, Tax Commissioner of the State of Connecticut. Filed March 9th, 1927. File No. 32,532.

Office Supreme Court, U. S.
FILED
MAR 9 1927
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut,
Petitioner,

against

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, FRANKLIN C. LEWIS, ABRAHAM L. GUTMAN, Executors,
Respondents.

No. [redacted] 190

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF FAIRFIELD COUNTY OF THE STATE OF CONNECTICUT AND BRIEF IN SUPPORT THEREOF.

BENJAMIN W. ALLING,
Attorney General of Connecticut,

FARWELL KNAPP,
Inheritance Tax Attorney of Connecticut.

CHARLES E. HUGHES,
LUCIUS F. ROBINSON,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut,
Petitioner,

against

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, FRANKLIN C. LEWIS, ABRAHAM L. GUTMAN, Executors,
Respondents.

No.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF FAIRFIELD COUNTY OF THE STATE OF CONNECTICUT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, WILLIAM H. BLODGETT, as Tax Commissioner, on behalf of the State of Connecticut, respectfully shows:

This is a petition for a writ of certiorari to the Superior Court of Fairfield County, Connecticut, to review that part

of its decision entered in accordance with mandatory advice from the Supreme Court of Errors of Connecticut, which adjudged that the State of Connecticut could not collect a succession tax upon that part of the Estate of Robert B. Hirsch, deceased, a resident of Connecticut, which consisted of United States Bonds, Treasury Certificates of Indebtedness, and cash, when the Bonds, Certificates and cash were in the State of New York at the time of the death, because the imposition of such a tax was beyond the power of the State of Connecticut, and because the imposition of such a tax would have amounted to a deprivation of the legatee's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

I.

Statement.

Robert B. Hirsch died on September 23, 1924, domiciled at Stamford, Connecticut, leaving a Will and two codicils thereto, duly executed in accordance with the law of Connecticut. Among the property owned by the decedent at the time of his death wer :

(a) Interest in the partnership of William Openhym & Sons, organized and doing business in New York City under the New York Limited Partnership Act, appraised at $1,687,245.34;

(b) Shares of Stock in New York, New Jersey and Canadian corporations, appraised at $277,864.25; the certificates of which were at the time of his death in New York City;

(c) Bonds and Treasury Certificates of Indebtedness of the United States, appraised at $615,121.17; said bonds and certificates being at the time of his death in New York City. While the property constituted a part of the decedent's "partners' investments" in that it was held by the partnership of William Openhym & Sons, subject to the terms of a certain letter, dated December 1, 1923 (R31), it was conceded by all parties that these bonds and certificates were the individual property of the decedent;

(d) A Savings Bank account in a New York Bank, appraised at $108.56;

(e) A life insurance policy in the Mutual Life Insurance Company of New York, payable to the Estate; said policy being at the time of his death in New York City; appraised at $14,820.11; and

(f) Cash in New York City, consisting of Bank Notes and coin, appraised at $287.48.

New York Proceedings:

The Will and codicils were offered for probate in the Surrogates' Court of New York County, and Letters Testamentary thereon were issued to the respondents herein. A Transfer Tax was levied and paid to the State of New York and a statement of the property upon which the Transfer Tax was so paid (R39) shows that a tax was imposed only upon the transfer of the stock in the New York corporations and of the interest in the New York partnership. No Transfer Tax was imposed upon the Bonds and Certificates of indebtedness of the United States, the cash, or other personal property owned by the decedent and within the State. Indeed the New York Transfer

Tax Law does not impose a tax upon such property of non-residents, even if located within the State.

Connecticut Proceedings:

Thereafter, and on January 8, 1925, the respondents exhibited to the Court of Probate for the District of Stamford, Connecticut, an exemplified copy of the Will and codicils of the decedent, and of the record of the procedure establishing the same in the Surrogates' Court of New York County, and on January 15, 1925, the Court of Probate for the District of Stamford, Connecticut, issued Letters Testamentary to the respondents herein.

On September 1, 1925 the respondents filed in the Court of Probate for the District of Stamford, and with your petitioner, the Tax Commissioner of Connecticut, a statement, under oath, covering the property of the estate and the claimed deductions therefrom, for the purpose of determining the succession tax due the State of Connecticut. The Connecticut inheritance and succession tax law (Chap. 190 of Acts in 1923) provided:

> "Sec. 1. All property, and any interest therein, owned by a resident of this State at the time of decease * * * shall be subject to the tax here prescribed."

Thereafter the Tax Commissioner filed a copy of his computation of the tax, imposing it upon the succession to, and the transfer of, all of the above enumerated property, with the Court of Probate, to which the respondents herein made objection. That Court on December 4, 1925, made its order approving the computation and directing payment of that sum.

The respondents duly took an appeal from that order to the Superior Court of Fairfield County of Connecticut, alleging *inter alia* as grounds of appeal that (R7):

> "4. Said Court of Probate erred in holding ing that the bonds owned by the decedent and located without the State of Connecticut are subject to the Connecticut Succession Tax."
>
> "7. Said Court of Probate erred in not holding that the attempt of the State of Connecticut to levy a Succession Tax on the Transfer of * * * said bonds * * * constitutes the taking of property without due process of law in violation of the Federal Constitution."

An agreed stipulation of facts was entered into by your petitioner and the respondents herein, and it was further stipulated that among the questions of law involved were (R26-27):

> "4. Were the United States Liberty Bonds mentioned in Exhibit A hereto annexed, and constituting a part of the "partner's investments", held by the partnership, referred to in paragraph 10 of the stipulation of facts, and physically situated in the State of New York at the time of the decedent's death, subject to the Connecticut succession tax?
>
> "10. Were the coins and bank notes (described as cash on hand) belonging to the decedent at the time of his death and situated at that time in the State of New York, subject to the Connecticut succession tax?
>
> "12. Is the succession tax imposed by the State of Connecticut on any of the foregoing items of property belonging to the decedent at the time of his

death, a taking of property without due process of law in violation of Amendment XIV of the Constitution of the United States?"

Your petitioner and the respondents herein stipulated that the questions of law involved in the appeal should be reserved for the advice and determination of the Supreme Court of Errors of Connecticut (R66). Accordingly, the Superior Court ordered that the questions of law raised by the stipulation be referred for advice to the Supreme Court of Errors.

The Supreme Court of Errors answered questions 4 and 10 in the negative, and answered question 12 in the affirmative so far as relating to the property affected by questions 4 and 10, and so advised the Superior Court of Fairfield County.

Accordingly, a final judgment was entered by the Superior Court of Fairfield County adjudging, among other things (R91-92):

"3. That the 'bearer' United States Liberty Bonds, valued at $604,356.10, owned by the decedent at the time of his death and physically situated in the State of New York at said time, were not subject to the Connecticut succession tax."

"4. That the 'bearer' Treasury Certificates, valued at $10,765.07, owned by the decedent at the time of his death and physically situated in the State of New York at said time, were not subject to the Connecticut succession tax."

"9. That the coins and bank notes (described as cash on hand) valued at $287.48, belonging to the decedent at the time of his death and situated at that time in the State of New York, were not subject to the Connecticut succession tax."

> "11. That the succession tax imposed by the State of Connecticut on the items of property belonging to the decedent at the time of his death and referred to in the foregoing paragraphs 3, 4 and 9, is a taking of property without due process of law, in violation of Amendment XIV of the Constitution of the United States."

All of the other property above enumerated (pp. 2-3, *supra*) was held subject to the Connecticut inheritance and succession tax, and the power of the State to impose the tax upon the succession to that property was sustained.

The sole ground of decision was that these Bonds and Certificates of indebtedness were "tangible personal property" and under the decision of this Court in *Frick* v. *Pennsylvania*, 268 U. S. 473, the State of Connecticut had *no power* to impose a succession tax upon them. The Court said:

> "As such" [*i. e.*, tangible personal property] "under the *Frick* case they are subject to a transfer tax in New York, where they are found, and nowhere else. Likewise, the cash in New York was subject to a Transfer Tax there, and nowhere else."

The General Assembly of the State of Connecticut, recognizing that this decision holding unconstitutional under the Federal Constitution of a portion of its statute constituted a public emergency, by an Act of February 23, 1927, authorized and directed your petitioner, as Tax Commissioner on behalf of the State of Connecticut, to petition this Court for a writ of certiorari reviewing this decision. A copy of that Act is printed as an appendix to this petition.

The respondents herein, as Executors of the Estate of Robert Hirsch, after the passage of that Act petitioned for

and have been granted a writ of error to this Court to review the decision of the Superior Court, insofar as it adjudged that a succession tax was properly imposed upon the interest of the decedent in (1) the partnership of William Openhym & Sons, (2) the stocks of corporations not organized under the laws of the State of Connecticut, (3) the proceeds of a policy of life insurance, issued by a New York Insurance Company, and (4) deposits in banking institutions not situated in the State of Connecticut; said Certificates of stock and said policy of insurance being within the State of New York at the time of the death of the decedent.

II.

The Issue.

The issue thus presented by this petition is, whether the State of Connecticut has the power to levy a tax upon the succession to or the transfer of personal property of a resident decedent evidenced by Bonds and Treasury Certificates of Indebtedness of the United States, and cash, when such bonds, certificates and cash are outside of the territory of the taxing State at the time of death.

III.

Reasons for Review.

Your petitioner earnestly submits that the opinion of the Supreme Court of Errors of Connecticut is a misinterpretation of *Frick* v. *Pennsylvania,* 268 U. S. 473; that it is contrary to the principles of law as they have always been

understood and asserted and which should not be departed from in an absence of a decision by this Court upon the point; that it is contrary to the statement of this Court in *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69, 81, and that the Fourteenth Amendment to the Federal Constitution does not preclude a State from imposing a tax upon the succession to or the transfer of Municipal bonds, Treasury Certificates of Indebtedness, and cash of a citizen wherever such property might be at his death.

The decision is of fundamental importance to the State of Connecticut and to every one of the States. The amount involved in this particular suit is large. In addition, a large amount of refunds will be necessary if the decision of the State Court is upheld. Moreover, many States do not impose a tax upon such property of non-residents within the State at the time of the death of the non-resident. The ease with which bonds and cash and similar property can be moved about and secreted makes it possible for the owner of such property to avoid altogether taxation upon the succession to it should the Fourteenth Amendment be held to prevent the State of domicil from imposing a tax upon the succession to or the transfer of it. This facility with which such property can be moved about from place to place—and held in different jurisdictions at the will of the owner without the knowledge of the taxing authorities of the State in which it might happen to be at the time of the owner's death renders it highly important that the power of the State of the domicil should be upheld.

The judgment of the Superior Court of Fairfield County, entered in accordance with the mandatory advice of the

Supreme Court of Errors, is the judgment of the highest court of the State of Connecticut in which a decision on this suit could be had. According to the practice in Connecticut the record in this case is lodged in the Superior Court of Fairfield County, and a writ of certiorari properly runs to that court. *Clarke's Appeal,* 70 Conn. 483; *Foote* v. *Women's Board of Missions,* 162 U. S. 439.

WHEREFORE, your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari, directing the Superior Court of Fairfield County, Connecticut, to certify and send to this Court a full and complete transcript of the record herein, to the end that the said case may be reviewed and determined by this Court, as provided by law, and that so much of the judgment of the Superior Court of Fairfield County, Connecticut entered in accordance with the mandatory advice of the Supreme Court of Errors of Connecticut, as is herein involved, may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

William A Blodgett
Tax Comm. of Conn.

UNITED STATES OF AMERICA,
STATE OF CONNECTICUT,
COUNTY OF HARTFORD. } ss.: Hartford, March 8, 1927

WILLIAM H. BLODGETT, being duly sworn, says: That he is the Tax Commissioner of the State of Connecticut, petitioner; that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

William H Blodgett.

Sworn to before me this 8th day of March, 1927.

Farwell Knapp
Notary Public

Certificate.

We hereby certify that we have examined the foregoing petition and that in our opinion the petition is well founded and that the case is one in which the prayer of the petition should be granted by this Court.

CHARLES E. HUGHES,

Lucius F. Robinson

LUCIUS F. ROBINSON,

Farwell Knapp

FARWELL KNAPP,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut,
Petitioner,

against

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, FRANKLIN C. LEWIS, ABRAHAM L. GUTMAN, Executors,
Respondents.

No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

The sole issue involved in this petition is the power of the State of Connecticut to impose a tax upon the succession to and the transfer of so much of the Estate of ROBERT B. HIRSCH, deceased, a resident of Connecticut, which consisted of United States Bonds, Treasury Certificates of Indebtedness, and cash. The written evidences of those governmental obligations being within the State of New York at the time of the decease, the Superior Court of Fairfield County, Connecticut, has adjudged, in accordance with the mandatory advice from the Supreme Court of Er-

rors of Connecticut, that the imposition of such a tax is in violation of the Fourteenth Amendment of the Constitution of the United States.

FIRST. The decision by the State Court upon the Federal question is not in accord with the applicable decisions of this Court.

The power of the States to levy a tax upon the succession to, or the transfer of, the personal property of its citizens has long been recognized and constantly sustained by this Court. This Court has recognized that the tax is not a direct tax, but rather an excise tax. Accordingly, it was held in *Plummer* v. *Coler,* 178 U. S. 115, that the State of New York might impose such an excise tax upon the transfer of obligations of the United States.

Historically, this power of the States to tax has extended to all of the property of the resident decedent, except real property located without the State. Title to personal property descends, by well-settled principles of the common law, in accordance with the law of the domicil. It has therefore been recognized that the domiciliary State had the power to impose a succession or transfer tax upon all of the personal property of its resident decedents even when located outside of the State. That power was recognized, as it relates to bonds and stocks, as early as *Carpenter* v. *Pennsylvania,* 17 How. 456. In that case the Court said:

> "The validity of the Act, as affecting successions to open after its enactment is not contested; nor is the authority of the State to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied." (p. 462.)

This Court, however, has recently held in the case of *Frick* v. *Pennsylvania,* 268 U. S. 473, that the prohibitions of the Fourteenth Amendment precluded the State of Pennsylvania from levying a succession tax upon tangible personal property, consisting of furniture, pictures, etc., of one of its citizens, when that tangible personal property had a physical and permanent situs outside of the State and was taxed where it was so permanently located. This rule was deduced from the prior decision in *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, where it was held that the State of Kentucky could not impose an *ad valorem* tax upon a domestic corporation upon its tangible personal property—railroad equipment—permanently located outside of the State. But this case, as indeed did the *Frick* case, recognized that no such prohibition existed as regards intangible personal property. Indeed, the Court said (p. 205):

> "Respecting this, there is an obvious distinction between the tangible and the intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs,* except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequunter personan,* and to hold that the property may be taxed at the domicil of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained."

And subsequent to that case it was held that a State might tax tangible personal property—steamships—permanently located outside of the State, when such property had acquired no actual *situs* for the purpose of taxation. *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63.

The same distinction between the tangible personal property, consisting of furniture and paintings, which had a permanent and physical *situs* outside of the State, involved in the *Frick* case, and intangible personal property, such as debts, choses in action, specialties and bonds, was recognized in the *Frick* case. There the Court quoted at length from *Pullman's Car Company* v. *Pennsylvania,* 141 U. S. 18, 22, where a distinction was made between tangible and intangible personal property, and went on to say (p. 494):

> "Counsel for the State cite and rely on *Blackstone* v. *Miller,* 188 U. S. 189, and *Bullen* v. *Wisconsin,* 240 U. S. 625. Both cases related to intangible personalty which had been regarded as on a different footing from tangible property. When they are read with this distinction in mind, and also in connection with other cases before cited, it is apparent that they do not support the tax in question."

And in the most recent case of *Rhode Island Trust Company* v. *Doughton,* 270 U. S. 69, this Court said (pp. 80-81):

> "A State has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved, or its transfer. In the matter of intangibles, like choses in action, shares of stock, and bonds, the *situs* of which is with the owner, a Transfer tax of course may be properly levied by the State in which he resides."

This is the latest expression by the Supreme Court of the United States of the extent of the prohibition of which the Fourteenth Amendment imposes upon the States in the exercise of their taxing power. In its opinion, however, the State Court held that under the *Frick* case New York, and New York alone, could tax these obligations of the United States. In coming to that conclusion it cited *New Orleans* v. *Stempel,* 175 U. S. 309, 321, and *Westinghouse Electric Mfg. Co.* v. *Los Angeles,* 188 Calif. 491. But those cases recognizing the power of the State in which the bonds are permanently located to tax them, in no way destroy the power of the domiciliary State, Connecticut, to impose a tax upon the succession to, or the transfer of, the same property.

As a matter of fact, New York does not, and it did not impose upon the Estate of ROBERT B. HIRSCH, a succession or transfer tax upon these bonds and certificates of indebtedness in question. An examination of the inheritance tax statutes of other States shows that the States of Arkansas, California, Delaware, Kansas, Kentucky, Maryland, Massachusetts, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, Wisconsin and Wyoming do not tax the municipal bonds of non-residents, even when the written evidences of indebtedness are found within the State.

Moreover, one reason commonly advanced to support taxation by the State in which the evidences of indebtedness are found is the aid which that State may give under its laws to the collection of the debt. But in this instance, the State of New York can give no aid to the collection of or the enforcement of the obligations of the United States.

The power of Connecticut to tax is not dependent upon the solution of the question of the power of New York to tax. And where New York and the great majority of commercial States have decided not to tax such property of non-residents, the sustaining of this decision would wholly exempt that property from taxation.

SECOND. Your petitioner is competent to maintain this petition.

This petition is sought by the Tax Commissioner of the State of Connecticut on behalf of the State of Connecticut. Under the laws of that State he is charged with the enforcement of the Inheritance and Succession Tax Act. In order, however, that no possible doubt of his right to present this petition should exist and in order that it should be clearly understood that the aggrieved party is not the Tax Commissioner in his official capacity, but the State of Connecticut, the General Assembly has by Act of February 23, 1927, specifically directed the Tax Commissioner in his name and on behalf of the State to present this petition. A copy of that statute is printed as an appendix to this petition.

There can be no limit upon the power of the State of Connecticut to impose a tax upon the succession to or the transfer of personal property of its resident citizens unless that limitation is imposed by the Constitution of the United States and there is but one final judge of the meaning of that Constitution. We submit that the State is entitled to have the limits of its power adjudicated by the only Court competent finally to determine the issue.

The cases where a State Court has sustained a State statute as constitutional, either under the State Constitu-

tion or under the Federal Constitution, and an official of the State has attempted to maintain a writ of error upon the ground that the statute is invalid under the Federal Constitution, such as *Lampasas* v. *Bell*, 180 U. S. 276; *Braxton County Court* v. *West Virginia*, 208 U. S. 192; *Smith* v. *Indiana*, 191 U. S. 138; *Marshall* v. *Dye*, 231 U. S. 250; *Stewart* v. *Kansas City*, 239 U. S. 14, are manifestly not applicable. This is not a case where a State official is claiming that a law, the constitutionality of which has been sustained by the State Courts, is unconstitutional under the Federal Constitution. It is on the contrary a case where the officer charged by the law with the enforcement of a statute which has been held to be unconstitutional under the Federal Constitution is seeking on behalf of the State for a review of that decision. There surely can be no doubt but that a State is entitled to have the measure of its rights in levying succession taxes adjudicated by this Court.

THIRD. This petition presents a Federal question of importance and merits the consideration of this Court.

The power of the State of Connecticut to impose a tax upon the succession to or the transfer of property of a citizen, such as municipal bonds, wherever they may happen to be located at the time of his death, is an important attribute of its sovereignty. The applicable rules of law, we believe, sustain this highly important power—a power now asserted by the legislation of almost every State. Certainly this Court has never decided that a State has no power to tax the succession to government bonds belonging to its citizens when such bonds happened to be out of the

State at the time of the citizen's death. The *Frick* case is not authority for any such proposition. It concerned property such as furniture and pictures which had a permanent physical *situs* outside, and was taxed outside, of the domiciliary State. We submit that State Courts of Connecticut erred in holding that the *Frick* case necessitated the conclusion that the Connecticut statute, imposing a tax upon the succession to these municipal bonds of a citizen and resident, was invalid and unconstitutional because those bonds happened to be out of the State at the time of his death.

If the decision of the State Court is permitted to stand, it is evident that many persons residing in Connecticut will have the opportunity to deposit their United States bonds and Treasury Certificates of indebtedness in New York, or move them about from place to place without the State of Connecticut and thus altogether escape a tax upon the succession to this property. Such a result is not desirable when it is predicated upon a lack of the power of the State of domicil to impose the tax. There is no question but that the language of the State statute here involved is broad enough to impose the tax held invalid. The only reason why the tax has not been collected is because the Superior Court of Fairfield County, Connecticut, has, in accordance with the advice of the Supreme Court of Errors, felt obliged to extend the prohibition of the *Frick* case to a limit never held by this Court. It is earnestly submitted that it is of the utmost importance both to the State of Con-

necticut and to the other States of the Union that this question be decided by this Court.

Respectfully submitted,

Benjamin W. Alling.

BENJAMIN W. ALLING,
Attorney General of Connecticut,

Farwell Knapp

FARWELL KNAPP,
Inheritance Tax Attorney of Connecticut.

CHARLES E. HUGHES

Lucius F. Robinson

LUCIUS F. ROBINSON
Counsel.

Appendix.

STATE OF CONNECTICUT,

General Assembly,
January Session A. D. 1927

AN ACT CONCERNING A PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE STATE COURTS UPON THE CONSTIUTIONALITY OF CHAPTER 190 OF THE PUBLIC ACTS OF 1923, CONCERNING SUCCESSION AND TRANSFER TAXES.

WHEREAS, in a judgment entered December 10, 1926, by the Superior Court for Fairfield County in accordance with the advice of the Supreme Court of Errors in a certain action entitled "Arthur Silberman *et als.*, Executors, *v.* William H. Blodgett, Tax Commissioner (Arthur Silberman *et als.*, Executors' Appeal from Probate), it has been held that Chapter 190 of the Public Acts of 1923, being an Act concerning succession and transfer taxes, in so far as it imposes a tax upon the estates of decedents resident of this State in respect to certain classes of property belonging to them at their death, is in violation of the Fourteenth Amendment of the Constitution of the United States; and the question involved in said action of the right and power of the State to impose inheritance and other taxes upon the property of its citizens, or the succession thereto, or the transfer thereof, is a fundamental one, and its final determination by the Supreme Court of the United States is of the highest importance to this State and to its citizens and until such decision the situation

caused by the rulings of the Courts of this State constitutes an emergency, therefor

Be it enacted by the Senate and House of Representatives in General Assembly convened:

SECTION 1. The Tax Commissioner is empowered and directed in his name and in behalf of the State to petition the United States Supreme Court for review on writ of certiorari of the decision of the Superior Court of this State in the action aforesaid and the Attorney-General is empowered, with such associate counsel as he may deem requisite and proper, to present such petition to the United States Supreme Court in behalf of the Tax Commissioner and the State and if a writ of certiorari be granted to appear for and represent the Tax Commissioner and the State in the trial of said action in said Court.

SECTION 2. This act shall take effect from its passage.

Approved February 23, 1927,
JOHN H. TRUMBULL,
Governor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut,
Petitioner,

against

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, FRANKLIN C. LEWIS, ABRAHAM L. GUTMAN, Executors,
Respondents.

No. 964.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The pertinent facts are stated in the petition for the writ of certiorari and in the statement introducing the petitioner's brief.

Briefly, the decision of the Connecticut court, of which the petitioner makes complaint, is that the United States Liberty Bonds, treasury certificates and cash owned by the decedent at the time of his death were tangible personal

property; and that, as they were then physically located in the State of New York, the Connecticut statute which attempted to subject them to a succession tax was unconstitutional, under *Frick* v. *Pennsylvania*, 268 U. S. 473, as taking property without due process of law (R., 86-87).

POINT I.

Upon the only Federal question involved in this case the decision of the Connecticut court is clearly correct.

The petitioner has failed to state clearly the issue involved in determining whether this petition for certiorari should be allowed. The issue is not whether this court would have agreed with the Connecticut court on the tangible nature of the property and its taxability, but whether a Federal question was involved and was rightly decided.

There was a Federal question involved. Having decided that the bonds, treasury certificates and cash were tangible personal property (which was a local question), the Connecticut court had to decide whether they could be made subject to the succession tax attempted to be levied upon them by Chapter 190, Public Acts of Connecticut, 1923, consistently with the due process of law required by the Fourteenth Amendment to the Federal Constitution. This Federal question was rightly decided. Since the property held to be tangible was located outside the State of Connecticut at the time of the decedent's death, it came squarely within the rule laid down by this court in *Frick* v. *Pennsylvania*, 268 U. S. 473, and the Connecticut court so held. Hence, the determination of the sole Federal question involved rested squarely on the principles established by this court.

The decision of which the petitioner really makes complaint is that the bonds were tangible personal property to all intents and purposes. This part of the decision was necessarily precedent to the decision of the Federal question, but it was a question of purely local law to be decided by the State court.

We believe that its decision was entirely correct and that this court would have reached the same conclusion. The following cases treat such securities as the bonds and treasury certificates here involved as tangible personal property and are authority for the decision reached by the Connecticut court:

New Orleans v. *Stempel*, 175 U. S. 309, especially 321-323.
Wheeler v. *New York*, 233 U. S. 434, and cases cited p. 440.
Blackstone v. *Miller*, 188 U. S. 189, 206.
Foreign Held Bonds case, 15 Wall. 300.
Blain v. *Inby*, 25 Kan. 499.
McLaughlin v. *Cluff*, 240 Pac. (Utah) 161.

Whether this court would have reached the same conclusion or not, it seems to us that this was obviously a *question of purely local law to be decided finally by the State court.* It is clearly a part of the common law of the State and, we think, clearly of the same nature as those questions held to be local State questions, upon which the decision of the State court was final, in the following cases:

Orr v. *Gilman*, 183 U. S. 278.
Pennsylvania R. R. Co. v. *Hughes*, 191 U. S. 477, 486.
American Steel & Wire Co. v. *Speed*, 192 U. S. 500, 523.

Consolidated Turnpike v. *Norfolk etc. Ry. Co.*, 228 U. S. 596, 602.
Doyle v. *Atwell*, 261 U. S. 590.

If we understand correctly the principles on which this court takes jurisdiction, it will not examine into the correctness of the decision of the State court on a matter of local law, whether common law or statutory construction, if the State court has correctly decided the Federal question arising out of the decision on the local law. This is the implication of Rule 5, paragraph (a) of the present rules of this court and the principle has been laid down in a very long list of cases where the State and Federal questions have been separate and not dependent on each other, following *Murdock* v. *Memphis*, 20 Wall. 590.

The rule has again been laid down in a number of cases where a State question had first to be decided before the soundness of the constitutional point could be determined, which is the exact situation in the present case. Typical of these latter cases are the following:

Moffitt v. *Kelly*, 218 U. S. 400, 405-406.
Clement National Bank v. *Vermont*, 231 U. S. 120, 134.
Rogers v. *Hennepin County*, 240 U. S. 184.
Baltimore Traction Co. v. *Baltimore Belt R. R. Co.*, 151 U. S. 137.
Louisville etc. Ry. Co. v. *Mississippi*, 133 U. S. 587.

In each of these cases the State court passed upon a question of local law, just as in the present case the Connecticut court passed on the question of the nature of the bonds under Connecticut law. Taking such determination of the State law as final and conclusive, this court thereupon determined whether the Federal question arising out

of it had been correctly decided and whether any constitutional right of the party appealing had been violated.

This, we think, is precisely the course which should be followed in the present case, and that being so, it is apparent that under the principles of the *Frick* case above cited the decision of the Federal question was correct. The Federal question is one "concluded by previous decisions of this court" (the *Consolidated Turnpike* case, *supra*, at p. 600).

We submit, therefore, that since this application for a writ of certiorari is discretionary, it should not be granted where it is evident that the complaint of the petitioner arises not out of the determination of the Federal question, but out of the determination of the local State question.

POINT II.

The petitioner, having only an official and not a personal interest in the outcome of the appeal, has no standing to seek this writ of certiorari.

The petitioner frankly recognizes that this court has uniformly held that a State or local officer may not review the decision of a State court holding a State statute constitutional, where he seeks the review by virtue of his official interest and without any personal interest in the outcome. The petitioner himself cites the applicable cases on page 19 of his brief:

Smith v. *Indiana*, 191 U. S. 138.
Braxton County Court v. *West Virginia*, 208 U. S. 192.
Marshall v. *Dye*, 231 U. S. 250.
Stewart v. *Kansas City*, 239 U. S. 14.
Lampasas v. *Bell*, 180 U. S. 276.

He attempts to distinguish these cases from the present one on two grounds: (1) that here the State official is seeking to review the decision that the State statute is *unconstitutional*, and (2) that the statute passed by the State legislature just prior to his application for a writ (printed at the end of petitioner's brief), authorizing and directing him on behalf of the State to petition for this writ, gives him a standing which he might not otherwise have possessed. We submit that neither ground of distinction is tenable.

The basis of the rule which the petitioner tries to avoid is consistently stated to be that "the interest [of the complaining party] must be of a personal and not of an official nature" (the *Braxton* case, *supra*). He is required to have "a personal as distinguished from an official interest in the relief sought and in the Federal right alleged to be denied by the judgment of the State court" (the *Marshall* case, *supra*).

This rule is said to spring from another rule more frequently invoked, that a party cannot appear as appellant before this court on behalf of third persons and not of himself (*Smith* v. *Indiana, supra*).

It so happens that the cases decided by this court on the immediate point are cases where the decision of the State court *upheld* the constitutionality of the State statute at issue, but that is, we think, purely a coincidence arising in part from the fact that the great majority of State court decisions involving Federal constitutional points uphold the constitutionality of the State statute. Certainly there is not the slightest suggestion in the cases cited that the rule would be otherwise if the decision had been against the constitutionality of the statute, nor would such a distinction be reasonable, for the interest of the petitioner is no more personal, no less official, no less an attempt to present and establish the rights of third persons

when the State court finds the State statute unconstitutional than when it holds it constitutional.

Turning to the petitioner's second point, we cannot see how the statute adopted by the Connecticut legislature and approved February 23, 1927, two months and a half after the decision complained of, can give added force to the Tax Commissioner's petition. As in *Marshall* v. *Dye, supra*, this case presents a difference between the executive and legislative branches of the State government on the one hand, and the judicial branch on the other, relating entirely to State legislation. In the *Marshall* case the legislature had determined to submit a new constitution to the vote of the people of the State, but a citizen sought and secured from the State courts an injunction prohibiting the State Board of Elections, a branch of the executive department, from making such a submission. Thereupon the Board, with the governor as its head, sought to invoke the power of this court to uphold the position of the legislative and executive departments desiring to submit the projected constitution to the vote as against the decision of the judicial branch that it might not be so submitted. This court refused jurisdiction.

The situation in this case up to the passage of the Act of February 23, 1927, seems identical. The Connecticut legislature, by Chapter 190, Public Acts of 1923, the statute in question, purported in Section 1 to tax "all property, and any interest therein, owned by a resident of this State at the time of decease" (Petition, p. 4). At no point in this case has it been disputed that the legislature thereby intended, if possible, to tax the property concerned in this application. The executive, through the Tax Commissioner, sought to enforce the legislative intent. The judicial branch decided that it might not be done.

What new element does the Act of February 23, 1927, introduce? The legislature declares that by the judgment Chapter 190 has been held unconstitutional as to certain classes of property, that the question involved of the State's right and power to impose such taxes is fundamental, that the situation creates an emergency and that the Tax Commissioner is empowered and directed "in his name and in behalf of the State" to petition for this writ. What is this more than a statement that the legislature still adheres to the policy which it already expressed very definitely in 1923 that the property here involved should be subject to the succession tax attempted to be levied? The later act is purely a restatement of the same position which the legislature took in 1923. But if the judicial branch had authority to overrule the legislative and executive branches initially, the legislative branch cannot by a repetition improve its own standing or that of the Tax Commissioner.

Secondly, the recent act directs the Tax Commissioner to take the proceeding "in his name and in behalf of the State." The Tax Commissioner has no more of a personal interest now than he had before the act was passed. He is still an official and appears here as an official only and the act simply emphasizes his official capacity by its language.

No attempt is made by the statute to substitute the State as a party in place of the Tax Commissioner. Whether such substitution could be had is therefore not in question, and we do not argue the point. The statute, however, gives no color to any argument that the State is now a party, and it seems indisputable that despite the statute the Tax Commissioner is seeking the review on behalf of someone else and not because of his own personal interest. His petition, therefore, comes squarely within the rule of the cases cited at the beginning of this point.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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FILED
OCT 1 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut,
Petitioner,
vs.
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, *Executors,*
on Writ of Certiorari to the Superior Court of Fairfield County, State of Connecticut.

No. 190

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, *Executors,*
etc., Plaintiffs-in-Error,
WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut,
in Error to the Superior Court of the State of Connecticut.

No. 191

MOTION TO ADVANCE CASE FOR ARGUMENT.

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in Error to the Superior Court of the State of Connecticut.

No. 191

MOTION TO ADVANCE CASE FOR ARGUMENT.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, petitioner in Case No. 190 above, and de-

fendant-in-error in Case No. 191 above, by his counsel respectfully moves this Honorable Court that the above-entitled cases be advanced for argument to an early date in the term of this Court which opens on October 3, 1927.

These cases are of extreme public importance as they necessarily involve a determination of the power of the State of Connecticut, and of all of the States, to impose a tax upon the succession to certain classes of property of resident domiciled citizens.

Statement of the Case.

ROBERT B. HIRSCH died on September 23, 1924, domiciled at Stamford, Connecticut, leaving a will and two codicils thereto, duly executed in accordance with the law of Connecticut. Among the property owned by the decedent at the time of his death were:

(a) Interest in the partnership of William Openhym & Sons, organized and doing business in New York City under the New York Limited Partnership Act, appraised at $1,687,245.34;

(b) Shares of Stock in New York, New Jersey and Canadian corporations, appraised at $277,864.25; the certificates of which were at the time of his death in in New York City;

(c) Bonds and Treasury Certificates of Indebtedness of the United States, payable to bearer, appraised at $615,121.17; said bonds and certificates being at the time of his death in New York City;

(d) A Savings Bank account in a New York Bank, appraised at $108.56;

(e) A life insurance policy in the Mutual Life Insurance Company of New York, payable to the Estate; said policy being at the time of his death in New York City appraised at $14,820.11; and

(f) Cash in New York City, consisting of bank notes and coin, appraised at $287.48.

The will and codicils were first offered for probate in the Surrogates' Court of New York County, New York, and letters testamentary were issued thereon to the above-named executors. A Transfer Tax was levied and paid to the State of New York only upon the transfer of the stock in the New York corporation and of the interest in the New York partnership of William Openhym & Sons.

Thereafter an exemplified copy of the will and codicils, and of the record of the proceedings establishing the same in the Surrogate's Court of New York County, New York, was exhibited to the Court of Probate for the District of Stamford, Connecticut, and letters testamentary were issued to the above-named executors. They filed in the Court of Probate for the District of Stamford, and with the Tax Commissioner of Connecticut a statement under oath, covering the property of the estate and the claimed deductions therefor, for the purpose of determining the succession tax due the State of Connecticut.

The Tax Commissioner of the State of Connecticut computed the tax due the State of Connecticut under the provisions of Section 1 of Chapter 190 of the Acts of 1923, which provided:

> "Sec. 1. All property, and any interest therein, owned by a resident of this State at the time of decease * * * shall be subject to the tax here prescribed."

His computation was confirmed by the Probate Court for the District of Stamford, Fairfield County, Connecticut. The tax so imposed is in accordance with the terms of the taxing statute and was imposed upon the transfer of all of the above enumerated property. The Executors appealed to the Superior Court of Fairfield County, Connecticut, alleging that the State of Connecticut had no power under the Fourteenth Amendment to the Federal Constitution to impose such a tax and that the imposition of the tax denied full faith and credit to the laws of the State of New York. The Superior Court of Fairfield County, in accordance with mandatory advice from the Supreme Court of Errors of Connecticut, adjudged that the tax was in accordance with the statute, that the imposition of the tax did not deny full faith and credit to the laws of the State of New York and that the tax was constitutionally imposed upon the succession to all of the above described property, except upon the succession to the United States Liberty Bonds and Certificates of Indebtedness and the cash, being the property described in paragraphs (c) and (f) above. As to this property, the Superior Court adjudged, in accordance with the mandatory advice of the Supreme Court of Errors of the State of Connecticut, that the State of Connecticut had no power, under the Fourteenth Amendment to the Federal Constitution, to impose a succession tax upon it.

The Executors of the Estate of Robert B. Hirsch have by writ of error brought for review by this Court the judgment of the Superior Court of Fairfield County, Connecticut, in so far as it relates to the imposition of a succession tax upon the interest in the partnership, the shares of stock, the savings bank account and the life insurance policy. The Tax Commissioner, on behalf of the State of Connecticut, has been granted a writ of certiorari to review that part of

the judgment which held that the State of Connecticut had no power to impose a tax upon the succession to the United States Bonds, Certificates of Indebtedness and cash.

Reasons for Advancement.

These cases are of fundamental importance to the inheritance taxing authorities of the several States. The laws of almost every State impose a tax upon the succession to or the transfer of similar classes of property of resident citizens. The principles of law herein involved necessarily have to be applied in the settlement of many estates and uncertainty and confusion now exists as to the extent of the power of the States to levy a succession tax upon classes of property of its domiciled resident citizens, similar to those involved in this case.

Other cases in the State of Connecticut involving the imposition of a succession tax upon similar classes of property are now pending and must necessarily be held open until these cases can be determined.

WHEREFORE, it is respectfully moved that the above-entitled cases be advanced for argument to an early date in the October 1927 Term of this Honorable Court.

Respectfully submitted,

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FARWELL KNAPP,
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CHARLES E. HUGHES,
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ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, FRANKLIN C. LEWIS and ABRAHAM L. GUTMAN, Executors of the Will of Robert B. Hirsch, deceased, plaintiffs-in-error in Case #191 above and respondents in Case #190 above, by their counsel, respectfully join in the foregoing motion to advance these cases for early argument.

From inquiries made by the attorneys representing other large estates now in the process of settlement, we believe that the decision of these cases is of general importance in the determination of inheritance, succession and transfer taxes in a large number of cases and under the laws of substantially every State in the Union, and that the final settlement of these other estates cannot be had until the determination of these cases. The interest expressed in them is wide-spread and their early decision will be of benefit in a considerable number of cases now while estates and the taxes thereon are still unsettled.

So far as this estate is concerned, any tax which may eventually be found due to the State of Connecticut is payable by the terms of the decedent's will out of the residuary estate, and this entire residuary estate was left in trust to twelve named trustees to apply the net income therefrom to the free education of poor and deserving children in the Ethical Culture School now maintained in the City of New York, and to the free education, maintenance and support of poor and deserving young men and women who may desire to fit themselves for the career of teachers and who shall have displayed to the satisfaction of the directors of the Society for Ethical Culture sufficient capacity for such career. Pending the determination of the issues involved in these cases, the Executors are unable to

make final payment to the said trustees. The tax claimed by the State of Connecticut amounts with interest to over $200,000.

Respectfully submitted,

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KENNETH DAYTON,
Attorneys for Executors.

FILED
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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, Petitioner, *vs.* ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors.	No. 190.
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, Plaintiffs-in-Error, *vs.* WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut.	No. 191.

BRIEF FOR WILLIAM H. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, PETITIONER AND DEFENDANT-IN-ERROR.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

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BRIEF FOR WILLIAM H. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, PETITIONER AND DEFENDANT-IN-ERROR.

These cases involve the jurisdiction of the State of Connecticut under the Fourteenth Amendment to the Constitu-

County entered in accordance with the mandatory advice of the Supreme Court of Errors was that the imposition of the succession tax upon these items of property was a taking of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States (R. 78-81). That the basis of this judgment was the determination of the Federal question clearly appears from the opinion of the Supreme Court of Errors of Connecticut in which Chief Justice Wheeler said (R. 75):

> "The same considerations which converted state and municipal securities into tangible personal property necessarily operate to convert United States bonds and treasury certificates into tangible personal property. As such under the Frick case they are subject to a transfer tax in New York where they were found and nowhere else. Likewise the cash in New York was subject to a transfer tax there and nowhere else."

(3) Jurisdiction of this court is invoked under section 237(b) of the Judiciary Code (as amended by the Act of February 13, 1925, Chapter 229), being section 344 of Title 28 of the United States Code.

(4) The following cases are believed to sustain the jurisdiction of this court:

Carpenter v. *Pennsylvania*, 17 How. 456;
Kirtland v. *Hotchkiss*, 100 U. S. 491;
Keeney v. *New York*, 222 U. S. 525;
Bullen v. *Wisconsin*, 240 U. S. 625;
Rhode Island Hospital Trust Co. v. *Doughton*, 270 U. S. 69;
Public Utilities Commission of Rhode Island v. *Attleboro Steam & Electric Company*, 273 U. S. 83.

Statement of Facts.

Robert B. Hirsch died on September 23, 1924. at Stamford, Connecticut, leaving a will and two codicils executed in accordance with the law of Connecticut. At the time of his death he was domiciled in and a resident of Stamford within the State of Connecticut (R. 6). The property owned by the decedent at the time of his death was:

(a) Bonds and Treasury Certificates of Indebtedness of the United States, payable to bearer, appraised at $615,121.17, said bonds and certificates being at the time of his death in New York City;

(b) Cash in New York City, consisting of bank notes and coin, appraised at $287.48;

(c) Interest as a general partner in the limited partnership of William Openhym & Sons, organized and doing business in New York City under the New York Partnership Law, appraised at $1,687,245.34;

(d) Shares of stock in New York, New Jersey and Canadian corporations, appraised at $277,864.25, the certificates of which were at the time of his death in New York City;

(e) A savings bank account in a New York bank, appraised at $108.56;

(f) A life insurance policy in the Mutual Life Insurance Company of New York, payable to the Estate, said policy being at the time of his death in New York City, appraised at $14,820.11;

(g) Bonds issued by a Connecticut corporation, said bonds being in New York at time of death, appraised at $521.67; and

(h) Real estate situated in Connecticut, appraised at $45,000; cattle, horses, poultry, auto, wagons and carriages, situated in Connecticut, appraised at $1,058.75; stock in a Connecticut corporation, the certificate being in New York at the time of death, appraised at $120; an account receivable from a Connecticut resident, appraised at $2,675.52; and furniture situated in Connecticut appraised at $243.00.

The power of the State of Connecticut to impose a tax upon the succession to the property enumerated in paragraph (h) the Executors do not challenge.

NEW YORK PROCEEDINGS.

The will and the codicils were first offered for probate in the Surrogate's Court of New York County and on November 28, 1924, letters testamentary thereon were issued to the plaintiffs-in-error, respondents (herein referred to as the Executors) (R. 31).

On January 19, 1925, a transfer tax appraiser was appointed by the Surrogate's Court of New York County, who on December 31, 1925, reported that he had appraised the taxable property of the deceased within New York. His report was confirmed by an order of the Surrogate's Court of New York County dated January 6, 1926 (R. 37-38).

The New York Transfer tax law then in force (Laws 1922, ch. 430, printed in the Appendix at pages 52-53, *infra*) provided that the following property of non-residents should be subject to the New York Transfer tax: (a) real property, goods, wares and merchandise within the state, (b) shares of stock of domestic corporations, (c) stock, bonds or notes in foreign corporations where the property represented by such stock, bonds or notes consist

of real property located within the state to the extent to which the value of such real property is represented in the stock, bonds or notes, (d) an interest in a partnership conducting business in New York and (e) capital invested within the state. A transfer tax was accordingly levied by and paid to the State of New York only upon:

(a) The interest in the partnership of William Openhym & Sons, and

(b) The shares of stock in the New York corporations.

The total amount of the tax paid to the State of New York was $19,166.04 (R. 37-38).

CONNECTICUT PROCEEDINGS.

On January 8, 1925, the Executors exhibited to the Court of Probate for the District of Stamford, Connecticut, an exemplified copy of the will and codicils of the decedent and the record of the procedure establishing the same in the Surrogate's Court of New York, and on January 15, 1925, the Court of Probate for the District of Stamford, Connecticut, issued letters testamentary to these Executors (R. 40).

On September 1, 1925, they filed in the Court of Probate for the District of Stamford, and with the petitioner, defendant-in-error, herein, the Tax Commissioner of the State of Connecticut (herein called the Tax Commissioner) a statement under oath covering the property of the estate and the claimed deductions therefrom, for the purpose of determining the succession tax due the State of Connecticut. The Connecticut Succession and Transfer Tax Act

then in effect and concededly governing this case (Chapter 190 of the Acts of 1923) provided:

> "SECTION 1. All property and any interest therein, owned by a resident of this State at the time of decrease * * * shall be subject to the tax herein prescribed."

The Tax Commissioner then filed a copy of his computation of the tax due the State of Connecticut with the Court of Probate—using as the basis of his computation all of the property enumerated (p. 5, *supra*) including the interest in the partnership, Liberty Bonds, Certificates of Indebtedness, stock in foreign corporations, savings bank account, cash, the policy of insurance and the bonds of a Connecticut corporation (R. 48-49). The Executors made objections thereto. The Probate Court, by an order dated December 4, 1925, approved the computation as filed by the Tax Commissioner and directed payment of the sum of $188,780.58.

The Executors appealed to the Superior Court of Fairfield County, alleging as reasons of appeal that none of the decedent's property (except that itemized in paragraph (h), page 6, *supra*), was subject to the Connecticut succession tax, that the imposition of the tax upon such property constituted a denial of due process of law in violation of the Federal Constitution, and that the attempt of Connecticut to assert jurisdiction in relation to the transfer of said property amounted to a failure to give full faith and credit to the laws of New York in violation of the Federal Constitution (R. 4-6).

An agreed stipulation of facts (R. 6-22) was entered into and it was stipulated that among the questions of law involved in the appeal were whether the interest in

the partnership in whole or in part, United States Liberty Bonds, Treasury Certificates, stocks of foreign corporations, savings bank account, proceeds of the life insurance policy, and coin and bank notes (described as cash on hand) were subject to the Connecticut succession tax (R. 23); whether the imposition of the succession tax upon these items of property constituted a taking of property in violation of Amendment XIV of the Constitution of the United States; and whether the imposition of the succession tax upon any of these items of property was a failure to give full faith and credit to the laws of the State of New York in violation of Article IV, Section 1, of the Constitution of the United States (R. 24).

By agreement of the parties and upon order of the Superior Court (R. 56) the questions of law involved in the appeal were referred to the Supreme Court of Errors of Connecticut for advice and determination.

The Supreme Court of Errors in an opinion dated October 18, 1926 (R. 56 to 76), reported in 105 Conn. 192, held that the Liberty Bonds, Treasury Certificates and cash were not subject to the Connecticut succession tax because the imposition of such a tax would be a taking of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, but that the imposition of the succession tax upon every other item of property (interest in the partnership, stocks in foreign corporations, savings account in a New York bank, the life insurance policy payable to the estate and bonds of a Connecticut corporation) was a constitutional exercise under the Fourteenth Amendment of the taxing power of the State of Connecticut and was not a denial of due process of law nor a failure to give full faith and credit to the laws of New York.

Accordingly, a final judgment was entered by the Superior Court of Fairfield County adjudging (R. 78-81)

> "3. That the 'bearer' United States Liberty Bonds, valued at $604,356.10, owned by a decedent at the time of his death and physically situated in the State of New York at said time, were not subject to the Connecticut succession tax."
>
> "4. That the 'bearer' Treasury Certificates, valued at $10,765.07, owned by the decedent at the time of his death and physically situated in the State of New York at said time, were not subject to the Connecticut succession tax."
>
> "9. That the coins and bank notes (described as cash on hand) valued at $287.48, belonging to the decedent at the time of his death and situated at that time in the State of New York, were not subject to the Connecticut succession tax."
>
> "11. That the succession tax imposed by the State of Connecticut on the items of property belonging to the decedent at the time of his death and referred to in the foregoing paragraphs 3, 4 and 9, is a taking of property without due process of law, in violation of Amendment XIV of the Constitution of the United States."

The court also adjudged that the decedent's interest in the partnership was not to be treated as consisting of specific items of partnership property and was subject in whole to the Connecticut tax, that the stocks of foreign corporations, savings account in a New York bank and the proceeds of the policy of life insurance were subject to the Connecticut succession tax, and that the tax upon these items of property was not a taking of property without due

process of law nor a failure to give full faith and credit to the laws of the State of New York.

A writ of certiorari was granted by order of this court dated April 18, 1927, to review that portion of the judgment of the Superior Court of Fairfield County thus set out in paragraphs numbered 3, 4, 9 and 11 above (R. 95).

The Executors have taken a writ of error to this court to review so much of the judgment of the Superior Court of Fairfield County as held that the imposition of the tax was not a denial of due process of law nor a failure to give full faith and credit to the laws of New York.

Specifications of Error.

The Tax Commissioner, petitioner herein, alleges that the Superior Court of Fairchild County erred in adjudging, in accordance with the mandatory advice of the Supreme Court of Errors, that the State of Connecticut had no power under the Fourteenth Amendment to the United States Constitution to impose a tax upon the succession to the United States Liberty Bonds, Treasury Certificates of Indebtedness and cash owned by a citizen of Connecticut which were in the State of New York at the time of death.

It is submitted that the State of Connecticut was entitled to impose a tax upon the succession to all of the property here in question owned by the decedent at the time of his death. This is a brief for the petitioner in so far as this case is here upon writ of certiorari and it is an answering brief in so far as the case is here upon writ of error.

Summary of Argument.

These cases involve the determination of the jurisdiction of the State of Connecticut to impose a tax upon the succession to intangible personal property owned by one of its citizens at the time of his death. The power of the state of domicile to impose a tax upon the succession to such property of its citizen is an incident of its sovereignty and that power cannot be denied, unless somewhere within the Constitution of the United States there is found a prohibition of its exercise.

An examination of the cases decided by this court shows that classes of property identical with those here involved and similarly held outside the state at the time of death have been held taxable by the state of domicile. *Carpenter* v. *Pennsylvania,* 17 How. 456; *Keeney* v. *New York,* 222 U. S. 525; *Bullen* v. *Wisconsin,* 240 U. S. 625. This line of cases, augmented by dicta in many of the decided cases of this court, is, we believe, in no wise impaired or affected by the decision in *Frick* v. *Pennsylvania,* 268 U. S. 473. The contention that this property is not taxable takes two alternative phases: one, that the property is tangible property and as such is within the rule of the *Frick* case, and, two, that intangible personal property represented by specialties outside the state of domicile at the time of death cannot be taxed by the state of domicile. The answer to the first contention is that the property here in question consists of choses in action which in no real sense have any attributes of tangibility and that the doctrine of the *Frick* case is confined to chattels, the value of which is inherent in the thing, and which have an actual *situs* outside the tax-

ing state. The answer to the second contention is that such taxation has been imposed for many years by the several states and the power so to tax has been sustained by this court.

We submit, therefore, that all of the property here involved was properly included in the computation of the succession tax due the State of Connecticut.

ARGUMENT.

FIRST: The state of domicile can constitutionally impose a tax upon the succession to all of its citizen's intangible property even though the documents representing such property were at the time of the citizen's death outside the state.

Mr. Hirsch was concededly domiciled in Connecticut at the time of his death (R. 6).

The Connecticut Succession and Transfer Act of 1923 is a tax, not upon property, but upon the right or privilege of succession to the property of a decedent. *Corbin* v. *Townshend*, 92 Conn. 501. The nature of the tax has been explained and interpreted in *Hopkins' Appeal*, 77 Conn. 644; *Warner* v. *Corbin*, 91 Conn. 532; *Gallup's Appeal*, 76 Conn. 617; *Nettleton's Appeal*, 76 Conn. 235.

Concerning the Act of 1923 here in question, the Supreme Court of Errors in *Silberman* v. *Blodgett*, 105 Conn. 192, at p. 201, said:

> "Our present Succession Act, Chapter 190 of the Public Acts of 1923, does not differ in material degree from our earlier Succession Acts; the decisions under the earlier Acts are therefore equally applicable to the Act of 1923. It is 'not a tax upon property, but upon the right or privilege to succession to the property of a decedent.' *Corbin* v. *Townshend*, 92 Conn. 501, 503."

The nature of an inheritance tax such as that of the State of Connecticut has been explained by this court in *Plummer* v. *Coler*, 178 U. S. 115; *United States* v. *Perkins*,

163 U. S. 625; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283. In *Knowlton* v. *Moore*, 178 U. S. 41, Justice White, writing the opinion of the court, said (p. 47):

> "Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in case of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy."

The power of the state of a man's domicile to impose a tax upon the succession to or the transfer of his intangible property even when the evidences of such property were outside the state at the time of his death has constantly been asserted by the Legislatures of the various states. The Supreme Court of Errors of Connecticut states that at the present time the inheritance tax laws of over four-fifths of the states impose a tax similar to that imposed by Connecticut. *Silberman* v. *Blodgett*, 105 Conn. 192, 205 (R. 65). The state courts of highest resort have upheld the imposition of such a tax. Thus, in *Frothingham* v. *Shaw*, 175 Mass. 59, the power of Massachusetts to impose a tax upon the inheritance of the stocks and bonds of foreign corporations, bonds executed by residents of New York secured by mortgages on New Hampshire real property, and cash deposited in a savings bank and with individuals in New York all owned by one of its citizens, was sustained. In *Hopkins' Appeal*, 77 Conn. 644, Connecticut's power to

impose a tax upon the inheritance of one of its citizen's stocks and bonds in foreign corporations and bonds of the State of North Carolina, all of which property was in New York at the time of death, and cash and credits on deposit in New York, was affirmed. In *re Estate of Zook* (Missouri Sup. Ct., July, 1927), 296 S. W. 778, the power of Missouri to impose an inheritance tax upon stock in a Nebraska corporation owned by one of its citizens and located in Nebraska at the time of death, was upheld. In *In re Sherwood's Estate,* 122 Wash. 648, Washington's power to impose an inheritance tax upon shares of stock of foreign corporations and United States Treasury Certificates of Indebtedness owned by one of its ctizens and held without the state at the time of death, was upheld. In *Mann* v. *Carter,* 74 N. H. 345, New Hampshire's power to impose an inheritance tax upon a savings deposit in a Massachusetts bank owned by one of its citizens at the time of her death, was affirmed. In *People* v. *Union Trust Company,* 255 Ill. 168, Illinois' power to impose an inheritance tax upon stocks and bonds of foreign corporations of the value of $600,000, owned by a resident decedent, which property was in a safety deposit box in California, and upon a deposit of $16,140 in a California bank, was sustained. In *Lines' Estate,* 155 Pa. 378, Pennsylvania's power to impose a tax upon stock in a New Jersey corporation and mortgage bonds of a Missouri corporation which had been transferred by one of its citizens to a trust company in New York upon a revocable trust and which property was in New York at the time of death, was upheld. In *In re Estate of Hodges,* 170 Cal. 492, California's power to impose a tax upon the inheritance to stocks and bonds of foreign corporations owned

by one of its citizens which were actually in Massachusetts at the time of death, and deposits in Massachusetts banks, was sustained, and in *Commonwealth* v. *Williams' Executor,* 102 Va. 778, Virginia's power to impose a personal property tax upon stocks and bonds of foreign corporations of its citizen which were in the vaults of a New York safe deposit company at the time of death, was upheld.

The power has been affirmed by repeated decisions of this court. Thus, in *Carpenter* v. *Pennsylvania,* 17 How. 456, the State of Pennsylvania's jurisdiction to impose a tax upon the inheritance of stock in foreign corporations, bonds of the State of Kentucky and money on deposit in New York, the bonds and certificates of stock being without the state, was upheld, the court saying (p. 462):

> "nor is authority of the State to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied."

While this case was decided prior to the adoption of the Fourteenth Amendment to the Constitution of the United States, the principles therein enunciated were reaffirmed in *Orr* v. *Gilman,* 183 U. S. 278, where the court cited *Carpenter* v. *Pennsylvania,* and said (p. 286):

> "It is true that this case was decided before the adoption of the Fourteenth Amendment, but we think it correctly defines the limits of jurisdiction between the State and the Federal Governments in respect to the control of the estates of decedents, both as they were regarded before and have been regarded since the adoption of the Fourteenth Amendment. It has never been held that it was the purpose or function of that amendment to change the systems and policies of the States in regard to the devolution

> of estates or to the extent of the taxing power over them."

In *Keeney* v. *New York*, 222 U. S. 525, the jurisdiction of the State of New York to impose a tax upon the transfer of property of one of its citizens which had been conveyed *inter vivos* upon a revocable trust to a New Jersey trustee and which at the time of his death was located in Newark, New Jersey, was upheld. This property included stocks and bonds of corporations not organized under the laws of New York.

In *Bullen* v. *Wisconsin*, 240 U. S. 625, the power of the State of Wisconsin to impose a tax upon the succession to certain property of its citizen, the evidences of which were held by a trust company in Illinois upon a revocable trust at the time of his death, was sustained. This property (as appears from pages 68-70 of the Transcript of Record in this court) included shares of stock in Missouri, New Jersey and Illinois corporations; stock in a national bank organized under the National Banking Act; mortgage bonds and debentures issued by New Jersey, Illinois, Missouri, Utah and Kansas corporations; promissory notes of residents of Illinois and Minnesota; insurance policies issued by New York, Canadian and Wisconsin insurance companies; and money on deposit in two Illinois banks. All this property (except the insurance policy issued by the Wisconsin company, payable to the decedent's wife as beneficiary and invalidly assigned to the estate) had been subjected to the Illinois inheritance tax. Concerning the power of the State of Wisconsin to levy the tax in question, this court said, by Justice Holmes (p. 631):

> "The power to tax is not limited in the same way as the power to effect the transfer of property. If this fund had passed by intestate succession it would be recognized that by the traditions of our

> law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona* of the deceased. As the States where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicil, whatever the limitation of power over the specific chattels may be, and it is especially plain in the case of contracts and stock."

In *Rhode Island Hospital Trust Company* v. *Doughton*, 270 U. S. 69, Chief Justice Taft, writing for the whole court, said (p. 81):

> "In the matter of intangibles, like choses in actions, shares of stock and bonds, the situs of which is with the owner, a transfer tax, of course, may properly be levied by the State in which he resides."

The Executors were forced below to contend that the decision in the *Frick* case overruled *Bullen* v. *Wisconsin*. That contention has been precluded by this court itself for it cited *Bullen* v. *Wisconsin* in the *Frick* case and recognized that, in regard to the taxation of intangibles, it was controlling authority. Its authority was reaffirmed, subsequent to the decision in the *Frick* case, in *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69. Much has been said by the Executors in the courts below as to the changes in industrial society which have rendered obsolete the rule *mobilia sequuntur personam*, which they contend is the sole basis of *Bullen* v. *Wisconsin*. We do not apprehend such changes have occurred since 1915, when the power of the state of domicile to impose a succession tax

upon classes of property identical to those now in question and similarly held at the time of death was upheld by a unanimous court, nor since 1926 when that power was reiterated.

Nor does the decision in *Wachovia Trust Company* v. *Doughton*, 272 U. S. 567, in any way impair the settled rule enunciated in *Bullen* v. *Wisconsin*. The decision in the *Wachovia Trust Company* case turns solely upon the question of the Massachusetts law relating to testamentary powers. The testamentary power was created by a will executed by a resident of Massachusetts. The Supreme Court looked to the law of the domicile of the testator-donor and applied that law in determining whether the legatee took from the donor of the power, a Massachusetts citizen, or from the donee, a North Carolina citizen. Under the law of Massachusetts, the legatee takes from the donor. Accordingly, the State of North Carolina was held powerless to impose a tax upon the legatee's succession, since "No right exercised by the donee was conferred upon her by North Carolina" (272 U. S. 567, 575).

Even in the matter of the imposition of property or *ad valorem* taxes, the power of the state of domicile to impose a tax upon intangible personal property without the state has been upheld.

In *Cream of Wheat Company* v. *County of Grand Forks*, 253 U. S. 325, the State of North Dakota taxed its domestic corporations upon the aggregate market value of its outstanding stock less the value of all of its real and personal property and less certain indebtedness. This tax was construed by the state court as a tax upon the corporate franchise. The Cream of Wheat Company, a North Dakota corporation, conducted its manufacturing, commercial and financial business wholly outside the state. In sustaining the tax, this court said (pp. 328, 329):

"The Company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that State * * *. The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent *situs* beyond its boundaries * * *. The limitation upon the power of taxation does not apply even to the tangible personal property without the state of the corporation's domicile if, like a seagoing vessel, the property has no permanent *situs* anywhere. * * * Nor has it any application to intangible personal property."

In *Kirtland* v. *Hotchkiss*, 100 U. S. 491, the power of the State of Connecticut to tax its citizen upon certain bonds executed by residents of Illinois secured by mortgage of Illinois real property, which bonds were held in Illinois * was sustained, this court saying, at page 498:

"The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

"That debt, although a species of intangible property, may, for the purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because

* This appears in 42 Conn. 426, 429 and in the argument of counsel in the Supreme Court, 100 U. S. p. 494. The actual location of the bonds was considered of no importance by this court.

> its amount and maturity are set forth in a bond. That bond, *wherever actually held or deposited,* is only evidence of the debt, and if destroyed, the debt —the right to demand payment of the money loaned, with the stipulated interest—remains." (Italics ours.)

In *Citizens National Bank* v. *Durr,* 257 U. S. 99, Ohio's power to impose a property tax against one of its citizens upon his membership in the New York Stock Exchange was upheld. In that case, it appeared that the New York Stock Exchange was a voluntary association, that among its principal assets was the ownership of all of the capital stock of a holding corporation which owned the real property located in New York City which housed the Exchange. In sustaining the right of Ohio thus to tax the membership in this Association, the court said, p. 109:

> "Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that State to tax them even as against a resident of Ohio. (See *Rogers* v. *Hennepin County,* 240 U. S. 184, 191.) Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment (*St. Louis Southwest Ry. Co.* v. *Arkansas,* 235 U. S. 350, 367-368); much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both, forbidden."

And in *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, it was held that the City of Louisville in the State of Kentucky had the power to collect a tax upon property not included by one of its citizens in his return filed during his lifetime. The property was a bank account in a St. Louis, Missouri, bank. It was conceded by this court that

the bank account was also taxable in Missouri. Justice Holmes, writing for this court, said (pp. 58-59):

> "It is argued that in a later case this court has held the power of taxation not to extend to chattels permanently situated outside the jurisdiction, although the owner was within it. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; and that the power ought equally to be denied as to debts depending for their validity and enforcement upon a jurisdiction other than that levying the tax. But this Court has not attempted to press the principle so far and there is opposed to it the long established practice of considering the debts due to a man in determining his wealth at his domicile for the purpose of this sort of tax. The notion that a man's personal property upon his death may be regarded as a *universitas* and taxed as such, even if qualified, still is recognized both here and in England. *Bullen* v. *Wisconsin,* 240 U. S. 625, 631; *Eidman* v. *Martinez,* 184 U. S. 578, 586; *Attorney-General* v. *Napier,* 6 Exch. 217. It has been carried over in more or less attenuated form to living persons, and the general principle laid down in *Kirtland* v. *Hotchkiss, supra,* has been affirmed or assumed to be the law in every subsequent case."

To be sure, this court has sustained the power of the states to impose a property tax upon credits created in the course of business by a non-resident when the debtor resided within the taxing state—the so-called "business *situs*" cases—*New Orleans* v. *Stempel,* 175 U. S. 309; *Metropolitan Life Insurance Company of New York* v. *New Orleans,* 205 U. S. 395; *Liverpool & London & Globe Insurance Co.* v. *Orleans Assessors,* 221 U. S. 346; *Board of Assessors* v. *Comptoir National,* 191 U. S. 388; *Bristol* v. *Washing-*

ton County, 177 U. S. 133. It has sustained the power of the states in which bank deposits and negotiable instruments were located belonging to a non-resident to impose a tax upon the succession to them. *Blackstone* v. *Miller,* 188 U. S. 189; *Wheeler* v. *Sohmer,* 233 U. S. 434.

But all these cases are wholly irrelevant to the issues here involved. They in no wise diminish the power of the domiciliary state to impose a tax upon the succession to the same property. That this double power of taxation does exist side by side is demonstrated by the decision in *Bullen* v. *Wisconsin, supra,* where after Illinois had imposed a tax upon the succession to the shares of stock, the bonds, the checking account in the Illinois bank, and the policies of insurance in the New York and Canadian companies, this court upheld the power of the State of Wisconsin, the domicile of the owner, to impose a tax upon the succession to the same property. Double taxation does not constitute a denial of due process. *Kidd* v. *Alabama,* 188 U. S. 730; *Citizens National Bank* v. *Durr,* 257 U. S. 99. In *Blackstone* v. *Miller,* 188 U. S. 189, Justice Holmes, writing for the court, said (pp. 204, 205):

> "No doubt this power on the part of two States to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of Constitutional law."

> (pp. 206, 207) "The fact that two States, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on Constitutional grounds. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 53. The universal succession is taxed in one state, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money."

The problem of the avoidance of such double taxation is a problem not for the courts but for the legislatures of the various states and that problem the legislatures are today solving. The current solution widely adopted by the several states lies in the direction of recognizing that the principal and primary taxing jurisdiction is that of the domicile. Thus, thirty-five states: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin and Wyoming, and the Philippine Islands do not tax certificates of stock of foreign corporations belonging to non-residents, even though the certificates of stock are within the state at the time of death. Bonds of foreign corporations belonging to non-residents and unregistered, which at the time of death are within the state, are not taxed by Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Maryland,

Massachusetts, Michigan, Minnesota, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont and Wisconsin. Unregistered municipal bonds owned by non-residents and within the state at the time of death are not taxed by Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Kansas, Kentucky, Maine, Maryland, Massachusetts, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Wisconsin and Wyoming.

These illustrations suffice to show that the legislative tendency today is toward permitting the state of domicile to impose, and alone impose, a tax upon the succession to a man's intangible property, regardless of where it may be at the time of his death. It is this voluntary legislative action rather than the overruling of decided cases and the extension of the Fourteenth Amendment that will solve the problem of double taxation.

But the problem here involved is not double taxation, but escape from taxation. It must be recognized that at the present time a vast percentage of the wealth of this country is represented by intangibles, such as municipal bonds, shares of stock in foreign corporations and interest in unincorporated business conducted outside the state of domicile. If it should be held by this court that Government bonds and stocks in corporations organized in states other than that in which the decedent was domiciled can be constitutionally subjected to an inheritance tax only by the state in which the pieces of paper happen to be at the time of death, a large part of the wealth of this country will entirely escape from state inheritance taxation. By the simple expedient of depositing the bonds and certificates of stock in a safety deposit box in a state which has no inheritance tax, a man possessed of millions of dollars of wealth may thus

avoid taxation by the state in which he has lived and of which he died domiciled. And if it is true of Government bonds, it would seem equally to be true of municipal and state and corporate bonds. We submit that the Fourteenth Amendment does not necessitate any such result.

All the property here in question consists of choses in action, of a right on the part of the obligee to receive performance and a duty on the party of the obligor to render performance. The relationship is incapable of having spatial quality, of having an actual *situs*. When a chose in action is evidenced or represented by a document such as a bond, a certificate of stock or an insurance policy, the nature of the relationship is not changed. The obligation remains and that obligation can be enforced only where jurisdiction can be had over the obligor. Nor does the nature of the obligee's right to receive performance change. True, the document does have spatial quality and may have an actual *situs*. But its existence in a place in no wise affects the obligation. If a corporation organized under the laws of New Jersey issues a corporate bond which is owned by a citizen of Connecticut, the obligation of the debtor is in no whit affected by the chance that the bond one day is in New York, the next in Connecticut and the third in Florida. Nor is the right of the creditor to receive payment changed. A chose in action represented by a document can have no spatial qualities and no actual *situs*. The state of domicile, in the words of this Court, "for the general advantages of living within the jurisdiction" may, as it historically has, treat all of its citizen's choses in action as being present with him within the state. The right of the domicile so to do has been upheld by repeated decisions of this court. Thus, in *Kirtland* v. *Hotchkiss*, 100 U. S. 491, this court said (p. 498):

> "That debt, although a species of intangible property, may, for the purposes of taxation, if not for all others, to be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is the only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains."

To recapitulate: The power of the domiciliary state to impose a tax upon the succession to a citizen's intangible property, even when that property was evidenced by a writing not within the state, has been specifically sustained in *Carpenter* v. *Pennsylvania*, 17 How. 456; *Keeney* v. *New York*, 222 U. S. 525; *Bullen* v. *Wisconsin*, 240 U. S. 625.

The power is sustained *a fortiori* by the following cases upholding property taxes at the domicile on intangible property claimed by the taxpayer not to be within the state: *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; *Citizens National Bank* v. *Durr*, 257 U. S. 99.

And the power is sustained by well considered statements in:

(1872) *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 320;
(1881) *Bonaparte* v. *Tax Court*, 104 U. S. 592, 595;
(1903) *Blackstone* v. *Miller*, 188 U. S. 189, 207;
(1905) *Union Refrigerator Co.* v. *Kentucky*, 199 U. S. 194, 206, 211;
(1906) *Buck* v. *Beach*, 206 U. S. 392, 401;
(1911) *Southern Pacific R. R. Co.* v. *Kentucky*, 222 U. S. 63, 68;
(1914) *Hawley* v. *City of Malden*, 232 U. S. 1, 11;
(1920) *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325, 329;

(1925) *Frick* v. *Pennsylvania*, 268 U. S. 473, 494;
(1926) *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, 81.

These cases present consistent and indubitable authority validating the taxing power here exercised. This power, deemed to have existed since the inception of inheritance taxes in this country, cannot now be denied. It is entrenched in the fundamentals of our Government.

SECOND: The State of Connecticut has the constitutional power to impose its succession tax upon all of the property owned by this decedent which is in question in this case.

The computation of the Connecticut succession tax (R. 49) shows that the net taxable estate of Robert B. Hirsch was found to be $2,400,694.79. This figure is derived by adding the value of the property above enumerated (pages 5-6, *supra*) which amounts to $2,645,065.85, and subtracting therefrom the sum of $244,371.06, being deductions permitted by the State of Connecticut.

The Executors challenged the power of Connecticut to include in the computation of the tax all of the items of property above numerated (pages 5-6, *supra*) except that in paragraph (h). An examination of each item of property included by the Tax Commissioner in his computation shows that the State of Connecticut, under the repeated decisions of this court, had the power to measure the tax here imposed by all of the items of the decedent's property.

1. Questions Raised by Petitioner Under Writ of Certiorari.

(a) *Liberty Bonds and Treasury Certificates.*

The first item in controversy has to do with the power of the State of Connecticut to impose a tax upon the succession to the bearer United States Liberty Bonds and

Treasury Certificates of Indebtedness,* which were in New York at the time of death. The Supreme Court of Errors of Connecticut held that the bonds and treasury certificates were tangible property and as such, under the prohibition enunciated in the *Frick* case by this court, not taxable in Connecticut. This, we believe, is a misconception of the doctrine of the *Frick* case.

There is no mystery concerning the nature of a bond. It is the evidence of an indebtedness. *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Bonaparte* v. *Tax Court,* 104 U. S. 592. Recovery can be had without producing the bond. The common law rule requiring profert no longer exists. These bonds are readily transferable by delivery from one person to another just as, but to no greater extent than are other "listed securities"—bonds and shares of stock in large corporations.

But no amount of dealing, no amount of transfer, no amount of change, can destroy their essential characteristic as evidence of an indebtedness—as proof of the debtor's obligation to pay and of the creditor's right to receive. The property right thus evidenced is simply a chose in action which has no actual *situs* apart from the creditor. In no accepted sense can such a property right be considered tangible. Rather it is intangible and as such a succession tax may be levied upon it at the domicile of the

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*While these bonds and certificates of indebtedness were held by the partnership of William Openhym & Sons as "partners' investment" pursuant to the terms of letter dated December 1, 1923 (R. 27), it has been agreed between counsel for the respective parties that such property was not partnership property but was the individual private property of the decedent. It was not taxed by New York, although the interest of the decedent in the partnership was so taxed. The judgment of the Superior Court of Fairfield County, Connecticut, recites that these bonds and certificates of indebtedness were owned by the decedent at the time of his death (R. 79).

owner regardless of where the evidence may be. *Carpenter* v. *Pennsylvania, supra; Kirtland* v. *Hotchkiss, supra; Keeney* v. *New York, supra; Bullen* v. *Wisconsin, supra.*

Since these bonds are intangible property the rule of the *Frick* case has no application. It must be confined to chattels which have a permanent actual *situs* outside of the domiciliary state. The rule of the *Frick* case is deduced from the prior decision of this court in *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194. But that case recognized, as did the *Frick* case, that the rule announced had no application to intangible property. Indeed, the court in the *Union Transit Company* case said (p. 205):

> "Respecting this, there is an obvious distinction between the tangible and the intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs,* except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequunter personam,* and to hold that the property may be taxed at the domicil of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained."

The basis of the decision by the Connecticut Court that these bonds were tangible property was that they were Government bonds as distinguished from corporate bonds. There is no justification for classifying corporate bonds as intangible property and Government bonds as tangible. If

anything the distinction between Government bonds and corporate bonds operates in the direction of rendering these Liberty Bonds less tangible than corporate bonds. In the first place, they are not a charge upon any specific property and so cannot be said to be identified with real property located in any particular jurisdiction. In the second place, the state courts of no state can render any assistance in the collection of the obligation. No state has jurisdiction over the debtor or can compel payment of the obligation. In the third place, the domicile of the debtor is as much in Connecticut as anywhere within the United States. As was said by Justice Story in *Vaughn* v. *Northup,* 15 Peters, 1, 6:

> "The United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union, and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile. On the contrary, the administrator of a creditor of the government, duly appointed in the state where he was domiciled at his death, has full authority to receive payment, and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it."

The Supreme Court of Errors in holding that these Liberty Bonds and Treasury Certificates were tangible property (distinguishing them from corporate bonds which for inheritance tax purposes must under the decisions of this court be considered intangibles) cited *State Tax on Foreign-Held Bonds,* 15 Wall. 300; *New Orleans* v. *Stempel,* 175 U. S. 309; *Westinghouse Electric & Manufacturing Com-*

pany v. *Los Angeles County*, 188 Cal. 491; *People* v. *Home Insurance Company*, 29 Cal. 533. These cases wholly fail to sustain any such distinction. *State Tax on Foreign-Held Bonds, supra,* concerned the power of the state of the domicile of the debtor to impose a tax upon interest paid to holders of corporate bonds owned and held outside of the state. *New Orleans* v. *Stempel, supra,* was concerned with the power of the state of the domicile of the debtor to tax money represented by notes held within the state which had been invested in the regular course of business in the state. *Westinghouse Electric & Manufacturing Company* v. *Los Angeles County, supra,* dealt with the power of California to impose a tax upon a foreign corporation doing business within the state and held that credits arising from business transacted within the state under the circumstances of the case, were not taxable. *People* v. *Home Insurance Company, supra,* held that bonds of the State of California owned by a foreign insurance company and deposited with a banker within the state, in compliance with conditions of the California Statute permitting foreign companies to do business in the state were "property . . . within the state" and were subject to the California Revenue Act.

The statements in these cases as to the nature of municipal or government bonds must be confined to the purpose for which the statements were made, namely, to illustrate that such property might be taxed at the domicile of the debtor or perchance where such bonds were held. But none of the cases involved the imposition of inheritance taxes and none of them purported to announce that the state of domicile could not impose a tax upon the succession to municipal or Government bonds which at the time of its citizen's death were outside the state.

Moreover, the Supreme Court of Errors of Connecticut wholly failed to consider the statement made by this court in *Eidman* v. *Martinez*, 184 U. S. 578, 581, that United States Bonds are intangible property.

The power of the state of domicile to impose a tax upon the succession to corporate bonds cannot now be disputed. *Keeney* v. *New York, supra; Bullen* v. *Wisconsin, supra.* There is no justification for a distinction between corporate bonds and Government bonds. But at all events the proposition is concluded by the decision of this court in *Carpenter* v. *Pennsylvania, supra,* where as it appears from an examination of the record in the case below, *In re Short's Estate,* 16 Pa. State 63, a part of the property upon which the State of Pennsylvania levied an inheritance tax comprised bonds of the States of Kentucky and Tennessee and of the cities of Louisville, Kentucky, St. Louis, Missouri, and Cincinnati, Ohio, which were outside Pennsylvania at the time of death.

It has been suggested that the classification of the bonds and certificates of indebtedness as tangible property is wholly a question of Connecticut law and that this court has not power to review that determination. To this effect the Executors have cited *American Steel & Wire Company* v. *Speed,* 192 U. S. 500; *Pennsylvania Railroad* v. *Hughes,* 191 U. S. 477; *Consolidated Turnpike* v. *Norfolk & Ocean View Railway Co.,* 228 U. S. 596; *Doyle* v. *Atwell,* 261 U. S. 590, all of which involved some problem of the interpretation of a state statute. But the Supreme Court of Errors was not concerned with an interpretation of the Connecticut statute. The words of the statute were adequate for the purpose of

reaching the property in question. Such was the legislative intent. The sole controversy was as to the extent of the prohibition of the Fourteenth Amendment. The decision of the Connecticut Court is not that Liberty Bonds located in New York at the time of death were not within the terms of the Connecticut taxing statute but rather that the decisions of this court necessitated the holding that the State of Connecticut could not constitutionally tax such property. That decision was the determination of a federal question. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109.

The question is not as to which pigeon hole—that labelled "tangibles" or that labelled "intangibles"—this court will place these Liberty Bonds and Certificates of Indebtedness. The question is whether the State of Connecticut had the power to impose a tax upon the succession to them. Under the decisions of this court reiterated now for eighty years the State of Connecticut had that power. *Carpenter* v. *Pennsylvania*, 17 How. 456; *Keeney* v. *New York*, 222 U. S. 525; *Bullen* v. *Wisconsin*, 240 U. S. 625; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69.

(b) *Cash on Hand in New York.*

Among the decedent's property was the sum of $287.48, consisting of coin and bank notes (R. 26), which was in New York at the time of death. Apparently it was simply loose money which the decedent had in New York.

Under the decisions of this court, that property was taxable by the State of Connecticut. The rule enunciated in the *Frick* case must be considered as confined to the type of property there involved. That property was, to a large extent, the valuable paintings and works of art which now comprise the Frick collection, together with the household

furniture in New York and certain chattels consisting of domestic animals, automobiles, and the like in Massachusetts. None of that property, so far as the record shows, had ever been within the State of Pennsylvania. The property had acquired a permanent abiding place outside of the State of Pennsylvania. That this court did not intend the rule there enunciated to apply to all personal property is shown by the fact that it quoted from its opinion in *Pullman's Car Company* v. *Pennsylvania,* 141 U. S. 18, 22.

> "The old rule, expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicil, grew up in the middle ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself."

This statement is peculiarly applicable to the cash on hand now under consideration. Certainly, if the rule of *mobilia sequuntur personam* is applicable to gold and jewels because that class of property can be easily carried by the owner from place to place and secreted in spots known only to himself, it is applicable to bank notes and coin. The State of New York did not impose a tax upon the transfer of this property. It was of the class of property that ordinarily escapes taxation. It is of the class of property that is easily moved about with the person of the owner; that can be left by him in places where it is not apt to be found and in states where no inheritance taxes are imposed. These reasons justify the State of Connecticut in imposing a tax upon the succession to it.

This disposes of all of the property in controversy under the writ of certiorari. As to that property, we believe that the Supreme Court of Connecticut erred in holding that the rule enunciated in the *Frick* case prohibited the imposition of a succession tax upon this wholly dissimilar property. This property was not taxed in New York. The problem, therefore, is not one of "double taxation", but rather of "escape from taxation".

2. Questions Raised by the Executors on Writ of Error.

The Supreme Court of Connecticut sustained the imposition of the succession tax upon the interest in the partnership, the life insurance policy payable to the estate, the shares of stock in corporations not organized under the laws of Connecticut, the certificates of which were in New York at the time of death, the savings account in the National City Bank of New York, and the bonds issued by Connecticut corporations, the bonds being in New York.

(c) *Interest in the Partnership of William Openhym & Sons.*

The decedent's interest as a general partner in the partnership of William Openhym & Sons was valued at $1,687,245.34 (R. 7).

An examination of the record shows that the total assets of the partnership amounted to $3,771,766.02, of which real property amounted to $15,812.27, merchandise $68,042.99 and furniture and fixtures $8,000. All the rest of the property consisted of bank deposits, trade acceptances, notes and loans receivable, accounts receivable, advances, prepaid expenses to travellers, stock in foreign corporations and United States Liberty Bonds (R. 8-9). The indebtedness of the partnership amounted to $969,604.05, so that

the net value of the partnership was $2,802,161.97. Of this, as has been stated, the interest of the deceased was appraised at $1,683,269.56.

The partnership was a limited partnership organized in New York, the last agreement therefor having been executed in New York City on December 1, 1921 (R. 8). The New York Partnership Law then in force was Chapter 408, Laws of 1919, with immaterial differences identical with the Uniform Partnership Act, and the pertinent sections thereof are printed at pages 54-56 *infra*. To this statute there was added by Chapter 640 of the Laws of 1922 an article relating to limited partnerships, substantially identical with the Uniform Limited Partnership Act. This article in so far as here material was declaratory of the existing New York Law.

The nature of the interest of the decedent in this partnership must be determined in accordance with the law of New York. *King* v. *Sarria*, 69 N. Y. 24. This was conceded by the Executors in the State court. And of course under the Connecticut law there can be no question but that the interest of the deceased partner is an intangible one. *Canfield* v. *Hard*, 6 Conn. 180; *Filley* v. *Phelps*, 18 Conn. 294; *Witter* v. *Richards*, 10 Conn. 37.

Under Section 50 of the New York Law the property rights of a partner are (a) his rights in specific partnership property; (b) his interest in the partnership, and (c) his right to participate in the management.

Under Section 51, a partner is a co-owner with his partner of specific partnership property, holding this property as a tenant in partnership. This tenancy in partnership introduced by the Uniform Partnership Act and as defined by Section 51 has these incidents. A partner has a right equal to that of his partners to possess specific partnership property for partnership purposes, but not otherwise. His right in specific partnership property is not assignable nor

is it subject to attachment or execution upon a personal claim against him; upon his death the right to the specific property vests not in the partner's personal representative but in the surviving partner; his right in specific property is not subject to dower, courtesy or allowance to widows, heirs or next of kin.

By Section 52, it is specifically provided.

> "A partner's interest in the partnership is his share of the profits and surplus and the same is personal property."

Under Section 73, when the partner dies and the partnership continues, his partner's personal representative may have the value of his interest at the date of dissolution ascertained and receive as an ordinary creditor an amount equal to the value of his interest in the partnership with interest.

The rights of a general partner in a limited partnership are identical to those of a general partner in a general partnership, Sec. 98. And in regard to a limited partner's interest, Sec. 107 specifically provides:

> "A limited partner's interest in the partnership is personal property."

There is thus no distinction between the rights of a general partner in a limited partnership and those of a general partner in a general partnership. Both the general partner's and the limited partner's interest in the partnership is intangible personal property.

The interest of the decedent in the partnership of William Openhym & Sons was, under the law, simply a right to share in the partnership assets after its liabilities were deducted and a balance struck; it was an interest in the surplus, a chose in action.

Thus, in this very case, the amount of the gross assets of the partnership was established. The liabilities were ascertained, a balance struck and a certain percentage of that sum paid over to the Executors of Robert B. Hirsch. This interpretation of the nature of the decedent's interest in the partnership is confirmed by the very language of the partnership agreement itself. That agreement provided that in the event of death of any of the parties thereto the partnership should be dissolved and the interest or share of the deceased person should be taken and stated at the sum standing to the credit of the account of such deceased partner (R. 8).

In other words, the partnership agreement itself evidences the intention of the partners that their interest in the partnership property shall be an intangible one, that is, a right to an accounting. Even in New York before the Partnership Law of 1919 the intention of the partners was recognized as controlling. Thus, in *Darrow* v. *Calkins,* 154 N. Y. 503, it was said (pp. 515, 516):

> "It is, however, generally conceded that the question whether partnership real estate shall be deemed absolutely converted into personalty for all purposes, or only converted *pro tanto* for the purpose of partnership equities, may be controlled by the express or implied agreement of the partners themselves, and that where by such agreement it appears that it was the intention of the partners that the lands should be treated and administered as personalty for all purposes, effect will be given thereto. In respect to real estate purchased for partnership purposes with partnership funds and used in the prosecution of the partnership business, the English rule of 'out and out' conversion may be regarded as properly ap-

> plied on the ground of intention, even in jurisdictions which have not adopted that rule as applied to partnership real estate acquired under different circumstances and where no specific intention appeared. The investment of partnership funds in lands and chattels for the purpose of a partnership business, the fact that the two species of property are in most cases of this kind, so commingled that they cannot be separated without impairing the value of each, has been deemed to justify the inference that under such circumstances the lands as well as the chattels were intended by the partners to constitute a part of the partnership stock and that both together should take the character of personalty for all purposes, and Judge Denio in *Collumb* v. *Read* (*supra*) expressed the opinion that to this extent the English rule of conversion prevailed here. That paramount consideration should be given to the intention of the partners when ascertained, is conceded by most of the cases."

It, therefore, clearly appears that both under the partnership agreement and under the laws of the State of New York in which the partnership was formed, the interest of the partner was the right to receive a sum of money equal to his share of the net value of the partnership. This right to receive money, not even evidenced by a specialty, is intangible property.

In *Citizens National Bank* v. *Durr,* 257 U. S. 99, the power of the State of Ohio to impose a tax upon one of its citizen's membership in the New York Stock Exchange, a voluntary association organized in New York, was sustained, although much of the value of the membership was derived from being able to buy and sell securities in the Exchange, located in New York, and from the Association's

ownership of all of the stock of a New York corporation which had title to the real estate which housed the Exchange in New York, valued at in excess of $5,000,000.

The decedent's interest in the partnership being thus intangible property, it was properly included within the computation under the provisions of the Connecticut Succession Tax. That New York also subjected this interest to a transfer tax in no way affects the validity of the Connecticut tax and it is to be noted in this connection that the New York tax was levied not because the interest of the partner consisted of an interest in real property, goods, wares and merchandise within the State but because the statute specifically taxed the interest of a non-resident decedent in a partnership conducted within the State of New York. (See Appendix, pages 52-53). Under the law of New York and under the terms of the partnership agreement the decedent's entire interest in this partnership was an intangible interest, a right to an accounting, a right that there should be paid over to him a sum equal to his proportionate share of the net value of the partnership. That interest, we submit, was constitutionally taxed by the State of Connecticut.

(d) *Shares of Stock in Foreign Corporations.*

The decedent died owning shares of stock in corporations organized under the laws of New York, New Jersey and Canada, the certificates of which were in New York at the time of death, appraised at $277,984.25. New York imposed a tax only upon the transfer of the shares in the New York corporations.

The nature of a stockholder's interest in a corporation has recently been clearly defined by this court, in *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U. S. 69, 81:

> "The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property."

The power of the State of Connecticut to impose a tax upon such shares of stock so located at the time of death has constantly been upheld by the state courts. *People* v. *Union Trust Company,* 255 Ill. 168; *Cornett's Executors* v. *Commonwealth,* 127 Va. 640; *In re Sherwood's Estate,* 122 Wash. 648; in *In re Estate of Hodges,* 170 Cal. 492; In *In re Estate of Zook* (Missouri Supreme Court, July, 1927), 296 S. W. 778; *Lines' Estate,* 155 Pa. 378; *Commonwealth* v. *Williams' Executor,* 102 Va. 778; *Hopkins' Appeal,* 77 Conn. 644.

This power of taxation has been upheld by this court.

In *Carpenter* v. *Pennsylvania,* 17 How. 456, a Pennsylvania inheritance tax imposed upon shares of stock in corporations not organized under the laws of Pennsylvania, the certificates being outside the State of Pennsylvania at the time of death, was sustained.

In *Keeney* v. *New York,* 222 U. S. 525, the power of New York to impose a tax upon the transfer of its citizens' shares of stock in the Prudential Insurance Company, a

New Jersey corporation, which shares were held in New Jersey upon a revocable trust at the time of death, was sustained.

In *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, the court recognized that shares of stock were intangible property, and hence taxable at the domicile of the owner.

In *Bullen* v. *Wisconsin,* 240 U. S. 625, where the testator died owning shares of stock in corporations not organized under the law of Wisconsin, the certificates being in Illinois at the time of his death, this court sustained the inheritance tax imposed by the State of Wisconsin.

(e) *Savings Account with a New York Bank.*

Among the items of the decedent's property was the sum of $108.56 on deposit in a savings account in the National City Bank of New York. This obligation of the bank was simply a debt and as such is taxable at the domicile of the creditor. Such a tax has been sustained in *Mann* v. *Carter,* 74 N. H. 345; in *People* v. *Union Trust Co.,* 255 Ill. 168, and has been sustained in this court as to *ad valorem* taxes in *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, in which this court said (p. 58):

> "The present tax is a tax upon the person, as shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by references to the riches of the person taxed. Unless it is declared unlawful by authority we see nothing to hinder the State from taking a man's credit into account. But so far from being declared unlawful, it has been decided by this court that whether a State shall measure the contribution by the value

> of such credits and choses in action not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State."

See also *Kirtland* v. *Hotchkiss,* 100 U. S. 491.

In *Carpenter* v. *Pennsylvania, supra,* the State of Pennsylvania's power to tax money on deposit in New York was sustained, as it was in *Bullen* v. *Wisconsin, supra,* where the question was as to the power of Wisconsin to tax the transfer of a checking account in an Illinois Bank. Indeed, the only difference between *Bullen* v. *Wisconsin* and the present case is that in the Bullen case Illinois *also* taxed the fund, while in this case New York did not.

(f) *Life Insurance Policy.*

The decedent died having a policy in the Mutual Life Insurance Company of New York payable to his estate, appraised at the value of $14,820.11.

Certainly, a life insurance policy is but a written contract obligating the company upon certain contingencies to pay a sum of money. The policy of insurance is not a specialty. The obligation is a contract obligation and as such it falls within the category of intangibles. And the power of the domiciliary state to impose a tax upon it is sustained by *Kirtland* v. *Hotchkiss,* 100 U. S. 491, and *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54.

The matter, however, has been conclusively determined by *Bullen* v. *Wisconsin, supra.* In that case, among the property upon which the Wisconsin transfer tax was imposed were three policies of insurance issued respectively by a New York, a Canadian and a Wisconsin corporation, held in Illinois at the time of death. The right to tax the property was upheld.

(g) *Corporate Bonds of a Connecticut corporation.*

The final item in dispute is the two bonds of a Connecticut corporation, the Hubbard Heights Golf Club, Inc., amounting, with interest, to $521.67, owned by the decedent.

Both the residence of the debtor and creditor were in Connecticut. The mere fact that the bonds were outside the State at time of death does not destroy Connecticut's power to impose a tax upon the succession to them. *Kirtland* v. *Hotchkiss, supra; Carpenter* v. *Pennsylvania, supra; Keeney* v. *New York, supra; Bullen* v. *Wisconsin, supra; Rhode Island Hospital Trust Co.* v. *Doughton, supra.*

This examination in detail of the specific items of property which were included in the computation of the Connecticut Succession Tax has been made to show that while the Connecticut Succession Tax is not imposed upon property but upon the privilege of succession, every item included in the computation was an item which the State of Connecticut had the power to tax.

THIRD: The imposition of the Connecticut succession tax upon this property is not a failure to give full faith and credit to the public acts, records and judicial proceedings of the State of New York.

The Executors further contend that the judgment of the Connecticut Court herein and the proceedings antecedent thereto constituted a failure to give full faith and credit to the public acts, records and proceedings of the State of New York in violation of the Constitution of the United States (R. 96). We are unable to fathom any such constitutional objection.

The jurisdiction of the Surrogate of New York County, New York, to issue letters testamentary was dependent, the decedent being a nonresident, upon the existence of property within the County. Surrogate's Court Act, Sec. 45. The petition for the granting of letters specifically stated that the decedent was a resident of Connecticut (R. 28). This recital in the letters testamentary that the decedent left property in the County of New York is in no sense an adjudication that the property here in question has an exclusive taxing *situs* in New York, nor was it so intended. And an adjudication to that effect would not, under familiar principles of law, be binding upon the State of Connecticut, which was not a party to the New York proceedings.

Likewise the general recital in the letters testamentary that

> "the granting administration of all and singular the goods, chattels and credits of said testator doth belong to us . . ."

is in no sense an adjudication that the State of Connecticut could not constitutionally grant letters of administration upon the estate of its citizen. In the first place, Connecticut was not a party to the proceedings. In the second place, it is well settled that in the granting of administration each state may for itself decide whether it has jurisdiction. And if a state finds that it has jurisdiction, it may issue letters testamentary without regard to whether or not letters have been issued by some other state. So to do violates neither the Constitution of the United States nor the settled principles of the common law. *Burbank* v. *Ernst,* 232 U. S. 162; *Overby* v. *Gordon,* 177 U. S. 214, 227; *Thormann* v. *Frame,* 176 U. S. 350; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 404. In the third place, a comparison of the recital in the New York letters testamentary "the granting administration of all and singular the goods . . . doth belong to us" and Sec. 45 of the Surrogate's Court Act shows that the reference to "us" is to the County of New York, not to the State of New York.

In final analysis the assertion of the Executors resolves itself into a restatement of the contention that the property here in question was located in New York, was administered solely by New York courts and was subject to taxation only by New York.

This contention has been abundantly answered. The power of the state of domicile to impose a tax upon the succession to the property of its citizens cannot be defeated or diminished by the action of a sister state in granting letters testamentary. The power of the state of domicile to tax the succession to property of the nature here involved and similarly held at the time of death has been sustained by the repeated decisions of this court.

We respectfully submit that the computation of the succession tax due the State of Connecticut as computed by the Tax Commissioner of that state which involved an imposition of a tax upon the transfer of all the property herein involved was correct. We submit that so much of the judgment of the Superior Court of Fairfield County, Connecticut, which adjudged that the State of Connecticut had no power to impose a tax upon the succession to the United States Liberty Bonds, Treasury Certificates of Indebtedness and cash on hand was erroneous and should be reversed and that so much of the judgment of the Superior Court of Fairfield County as adjudged that the imposition of the succession tax upon the transfer of the interest in the partnership, the savings account in a New York bank, the shares of stock in foreign corporations, the United States Liberty Bonds, the certificates of which were within the State of New York at the time of the death, and the bonds of a Connecticut corporation, was correct and should be affirmed.

Respectfully submitted,

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Connecticut Succession and Transfer Tax Act.

PUBLIC ACTS OF 1923.

CHAPTER 190.

SECTION 1. All property and any interest therein owned by a resident of this state at the time of his decease, and all real estate within this state owned by a nonresident of this state at the time of his decease, which shall pass by will or inheritance under the laws of this state; and all gifts of such property by deed, grant or other conveyance, made in contemplation of the death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed. All property passing to or in trust for the benefit of any corporation or institution located in this state which receives state aid, or for the use of a municipal corporation for public purposes within this state, and all gifts of paintings, pictures, books, engravings, bronzes, curios, bric-a-brac, arms and armor and collections of articles of public interest, passing to any corporation or institution located in this state for preservation and free exhibition, and any gift to any association or corporation in trust for the perpetual care of cemetery plots to an amount not exceeding three hundred dollars, shall be exempt from such tax. The provisions of this act shall not apply to real estate situated without the state.

New York Transfer Tax Law.

Laws 1922, Ch. 430.

(In effect September 23, 1924.)

§220. TAXABLE TRANSFERS. A tax shall be and is hereby imposed upon the transfer of any property real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed thereof while a resident of the state.

2. In the case of a nonresident decedent when the transfer is by will or intestate law of any of the following items:

(a) Real property within this state, or goods, wares and merchandise within this state.

(b) Shares of stock or certificates of interest of corporations organized under the laws of this state, or of national banking associations located in this state, or of joint stock companies or associations organized under the laws of this state and including all dividends and rights to subscribe to the stock of such corporations, joint stock companies or associations or banks.

(c) Property evidenced by or consisting of shares of stock of a foreign corporation, joint stock company or association, or bonds, notes, mortgages or other evidences of interest in any corporation, joint stock company or association wherever incorporated or organized where the property represented by such shares of stock, bonds, notes, mortgages or other evidences of interest, consists of real property which is located wholly, or partly, within this state

to the extent to which the value of the said items respectively is enhanced, or is represented, or is secured, by real estate in the State of New York owned by such corporation, joint stock company or association. There shall be excepted from the classification of this subdivision all of such items where such corporation, joint stock company or association is or is in the nature of a moneyed corporation, a railroad or transportation corporation, a public service or manufacturing corporation as defined or classified by the laws of this state.

(d) The interest of such decedent in any partnership business conducted, wholly or partly, within the State of New York to the extent of the interest of the decedent in the partnership property within this state and the good will of such business within this state.

(e) Capital invested in business within this state.

Nothing in this section shall be taken to include deposits in banks or trust companies or with persons or corporations acting as bankers, or to permit of a transfer tax by reason of keeping securities, other than those taxable under this article, within this state.

New York Partnership Law

Laws 1919, Ch. 408.

(In effect September 23, 1924.)

§50. Extent of Property Rights of a Partner. The property rights of a partner are (a) his rights in specific partnership property, (b) his interest in the partnership, and (c) his right to participate in the management.

§51. Nature of a Partner's Right in Specific Partnership Property. 1. A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

2. The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the parties, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal

representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(c) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

§52. Nature of Partner's Interest in the Partnership. A partner's interest in the partnership is his share of the profits and surplus and the same is personal property.

§73. Rights of Retiring or Estate of Deceased Partner When the Business is Continued. When any partner retires or dies, and the business is continued under any of the conditions set forth in section seventy-two, subdivisions one, two, three, five and six, or section sixty-nine, paragraph (b) of subdivision two, without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnerships may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section seventy-two, subdivision eight of this chapter.

Sections 98 and 107 of the Partnership Law were added by the Laws of 1922, ch. 640.

§98. Rights, Powers and Liabilities of a General Partner. (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(a) Do any act in contravention of the certificate.

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(c) Confess a judgment against the partnership.

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose.

(e) Admit a person as a general partner.

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate.

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

§107. Nature of Interest in Partnership. A limited partner's interest in the partnership is personal property.

MAR 12 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, *Petitioner,* *vs.* ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors.	No. 190.
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, *Plaintiffs-in-Error,* *vs.* WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut.	No. 191.

REPLY BRIEF FOR WILLIAM H. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, PETITIONER AND DEFENDANT-IN-ERROR.

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REPLY BRIEF FOR WILLIAM H. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, PETITIONER AND DEFENDANT-IN-ERROR.

We desire to reply briefly to the argument of the Executors relating to the power of the State of Connecticut to impose a tax upon the succession to the Liberty Bonds owned by the resident decedent at the time of his death.

We present the following considerations:

FIRST. The question as to the quality of the Liberty Bonds here involved, in relation to the power of the state of Connecticut to impose a tax upon their transfer by the will of a citizen, is not a local question.

SECOND. The Supreme Court of Errors of Connecticut construed the succession statute of that state as covering in specific terms the succession to these bonds.

THIRD. The Liberty Bonds are not the less subject to the succession tax by the state of domicile because they are bonds payable to bearer which can pass from hand to hand.

FOURTH. Liberty Bonds are not the less subject to a succession tax of the state of domicile of the decedent because they are government obligations.

FIFTH. In classifying tangible and intangible personal property for the purpose of the determination of constitutional validity of a succession tax, there are public considerations of the highest importance.

FIRST: The question as to the quality of the Liberty Bonds here involved, in relation to the power of the State of Connecticut to impose a tax upon their transfer by the will of a citizen, is not a local question.

No question of fact was involved in the decision in this case; nor can there be any controversy as to the nature of these bonds. There was no dispute that they were Liberty Bonds. There was no dispute that they were in New York at the time of death. They were concededly in safe deposit boxes and were constantly subject to the control and disposition of the owner who had them there for purposes of convenience and who could take them out of the boxes at any time and move them about either within or without the state at his will.

The Supreme Court of Connecticut did not deal with the quality of these bonds as a local question or one to be determined by its own jurisprudence.

The State of New York has made no attempt to fix a situs of these bonds for any purpose. New York did not impose a tax upon their transfer. The legislature of that State has deliberately adopted the policy of not taxing such intangible property of a non-resident. The State of Connecticut did tax their transfer. The question is exclusively one of the constitutional validity of the Connecticut Succession Tax and its application to these Liberty Bonds.

SECOND: The Supreme Court of Errors of Connecticut construed the Succession Statute of that State as covering in specific terms the succession to these bonds.

The applicable Statute of Connecticut, section 1 of chapter 190 of the Acts of 1923—levied a tax upon "All property and any interest therein owned by a resident of this state" at the time of decease.

The Supreme Court of Connecticut stated that the features of that tax statute were as follows (R. 64):

> "We dwell upon these familiar decisions in order to especially emphasize three features underlying our succession act, and indeed every succession act: (1) The succession to real estate within the state and personal property everywhere is governed by the law of the state of the decedent's domicile; (2) the state exercises this right in virtue of the privilege it accords to its citizens or its domiciled residents of either disposing of their property by will, or, in the event of intestacy, having it descend in accordance with the statute law of the state; (3) a succession tax is not an ad valorem tax, nor to be considered upon the same basis as that tax, it is a privilege tax, an excise tax, such as a franchise tax.
>
> "The decisions and the legal literature upon this subject not infrequently fail to distinguish the succession tax as wholly apart from the ad valorem tax. The taxable situs of the former depends for its jurisdiction upon the domicile of the decedent; the latter upon the situs of the property taxed. The attempt to rest the jurisdiction of each upon the situs of property taxed requires a departure from the underlying principle of the succession tax—the right to receive from the decedent, as we hold, or as many jurisdictions hold, the right to transmit from the decedent."

After reviewing these decisions, the court clearly showed that it considered that the Legislature had intended to cover by its Succession Act the transfer of all of the personal property of the decedent, including the bonds in question.

The Connecticut Supreme Court, not because of any construction of the Connecticut statute which would eliminate these bonds from the property intended to be taxed by the statute, but because of the decision of this court in the *Frick* case, held that the imposition of the succession tax upon the Liberty Bonds was invalid because in violation of the Fourteenth Amendment. It simply deferred to the *Frick* case as the court construed it. The court summarized its conclusions as follows:

> "The same considerations which converted state and municipal securities into tangible personal property necessarily operate to convert United States bonds and treasury certificates into tangible personal property. As such under the *Frick* case they are subject to a transfer tax in New York where they are found and nowhere else."

The case thus falls squarely within the principle of the decision of this court in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, where the state court excluded certain contracts from the operation of a state statute under the compulsion, as it thought, of the Federal Constitution. In that case, Justice Brandeis said (p. 120):

> "If that court had construed the Arbitration Law as excluding from its scope controversies which are within the admiralty jurisdiction, the construction given to the state statute would bind us; and there would be no occasion to consider the constitutional question presented. *Quong Ham Wah Co.* v.

Industrial Accident Commission, 255 U. S. 445; *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 510. An expression used by the Court of Appeals lends some color to respondent's contention, 233 N. Y. 373, 381. But a reading of the whole opinion shows that the state court excluded maritime contracts from the operation of the law, not as a matter of statutory construction, but because it thought the Federal Constitution required such action. Compare *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263. We proceed, therefore, to the consideration of the constitutional question."

The question as to the validity of the tax in relation to the Liberty Bonds is necessarily one for the decision of this court.

THIRD: The Liberty Bonds are not the less subject to the succession tax by the state of domicile because they are bonds payable to bearer which can pass from hand to hand.

We are not here dealing with the power of the states in which the bonds are found to impose a property tax upon them. The cases cited by the Executors in an endeavor to show that the State of the domicile of the owner is without power to impose a tax upon the succession to these bonds upon his death, deal not only with bonds, and bonds payable to bearer, but also with notes and even credits arising out of a local business. These cases deal with the question whether the state in which the debtor lives, or the securities are held in the circumstances stated, may fix a situs there for the purpose of taxation. The logic of these cases is no way limited to bonds, whether corporate bonds or others. Such are the cases of:

Foreign-Held Bonds Case, 15 Wall. 300;
New Orleans v. *Stempel*, 175 U. S. 309;
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S. 395;
People v. *Home Ins. Co.*, 29 Cal. 533;
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These are the typical cases, the strongest, on the point sought to be made by the Executors. None of them involve inheritance taxes; none of them involve the power

of the state of domicile of the owner to tax the transfer of them by him; in none of them was the fact that they were bonds or bearer securities or governmental obligations determinative.

For the purpose of such property taxation at the place where found, bonds payable to bearer must be placed in the same category as other choses of action which because of origin, or evidence, are held to be there taxable. Their taxability at the place in which they are found is determined not because of their negotiability or because they are easily carried about, but because of their relation to the state in which they are and its power to impose a property tax in view of that relation. These cases in no wise affect the constitutional power of the state of domicile to impose a tax upon the succession to property of the same sort.

The power of the state of Wisconsin, the domicile of the deceased owner, to impose a tax upon the transfer of the following bonds, held outside of Wisconsin and within Illinois at the time of death, was sustained in *Bullen* v. *Wisconsin*, 240 U. S. 625:

75 4% Union Pacific R. R. Co.
35 4% Wisconsin Central Railway Co.
25 4% Chicago, Burlington & Quincy R. R. Co.
75 5% Chicago City Railway Co.
35 4% Joint Northern Pacific Railway Co. and Great Northern Railway Co.
25 4% Atchison, Topeka & Santa Fe Railway Co.

Likewise the power of New York, the domiciliary state, to impose a tax upon the transfer of the following bonds, which were held in New Jersey at the time of death, was sustained in *Keeney* v. *New York*, 222 U. S. 525:

20 4% Pere Marquette R. R. Co.
70 4% Birmingham Belt R. R. Co.
146 5% South Jersey G. E. & T. Co.
70 4% Pittsburgh, Cinn., Chic. & St. L. Ry. Co.
39 4% Cleveland, Cinn., Chic. & St. L. Ry. Co.
10 4% St. Louis & San Francisco R. R. Co.
20 4% St. Louis & San Francisco R. R. Co.
35 4% Kansas City, Fort Scott & Memphis Ry. Co.

This doctrine was reiterated in *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, where Chief Justice Taft, writing for the whole court said (p. 81):

> "In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax of course, may be properly levied by the State in which he resides."

Unless this court is prepared to overrule *Bullen* v. *Wisconsin, supra,* the authority of which is recognized in the *Frick* case, the mere fact that the bonds are bonds or that they are payable to bearer cannot detract from the constitutional power of the State of Connecticut to impose a tax upon the succession to them.

FOURTH: Liberty Bonds are not the less subject to a succession tax of the state of domicile of the decedent because they are government obligations.

Under the settled decisions of this court, Connecticut may impose a tax upon the succession to these bonds unless the fact that they are governmental obligations in some way detracts from the constitutional power. Upon what possible theory can a distinction between governmental and corporate bonds be maintained? Corporate bonds are just as much physically outside the state of domicile as are governmental bonds. Many corporate bonds pass as readily from hand to hand, are as easily and readily dealt in upon the exchanges of this country, and have for all practical purposes the same characteristics, as Liberty Bonds. Liberty Bonds are not legal tender, if this fact were of any importance. Liberty Bonds have their fluctuations in value. But the point is this that in regard to manumission—the facility of handling—the methods of dealing, and, above all, the opportunities for concealment, they are in the same category as corporate bonds.

This court has treated Union Pacific bonds, Chicago, Burlington & Quincy bonds and many other corporate negotiable bonds of the highest class of securities, constantly dealt in and transferred freely from hand to hand, and commonly held in safe deposit boxes, as intangible property for the purposes of a succession tax.

Can it be said that these bonds are intangible, and yet that Liberty Bonds are tangible? Can it be said that the Fourteenth Amendment sanctions the domicile of the owner in imposing a tax upon the transfer of the former, but prohibits the taxation of the succession to the latter? If so, upon what possible ground?

The distinction between tangible and intangible is a distinction, which so far as the constitutional validity of succession or transfer taxes imposed by the state of domicile are concerned, requires a better basis than any possible distinction between a government bond and a railroad bond. Corporate bonds are engraved upon the same kind of paper as Liberty Bonds. They have the same appearance to the eye. They are susceptible to the same touch. They are the same size. They are handled in the same manner, kept and dealt with in the same way.

The distinction between tangible and intangible property in respect to succession taxes must go deeper. It must have relation to other attributes which are associated with the idea of character and permanency of location. The Frick collection of paintings housed in New York, the furniture and fixtures in a residence, have attributes which cannot be attached to corporate bonds, kept, perhaps, for purposes of concealment as well as of freedom of control and having mobility and facility of transfer as the essential characteristic.

This was the *ratio decidendi* of decision in *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, where the court said (p. 206):

> "The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is *visible, easily found and difficult to conceal, and the tax readily collectible,* is so cogent an argument for its taxation at its situs, that of late there is a general concensus of opinion that it is taxable in the state where it is permanently located and employed and where it receives its entire protection, irrespective of the domicile of the owner." (Italics ours.)

FIFTH: In classifying tangible and intangible personal property for the purpose of the determination of the constitutional validity of a succession tax, there are public considerations of the highest importance.

A great part of the wealth of this country is today represented by bonds. Exemption from the state income taxes has made United States Bonds a favorite investment. Without exaggeration, it may be said that most large estates contain Liberty Bonds.

A decision by this court that the state of domicile cannot constitutionally impose a tax upon the succession to United States and other governmental and municipal bonds which are outside the state of domicile at the time of death will result in the escape of this class of property from death taxation. It can be safely said that all of the outstanding governmental and municipal bonds could be gathered into a few vaults located in the States of Florida or Nevada or the District of Columbia, in which no inheritance tax is imposed, and thus wholly avoid inheritance taxation.

There is no problem of double taxation involved in this case. The State of New York did not impose a tax upon the transfer of these bonds. Further, double taxation, as frequently stated by this court, is not prohibited by the Fourteenth Amendment. But, what is most important, the legislatures of many of the states, wisely recognizing the desirability of a uniform system of inheritance taxation and desirous of reaching this result by agreement—the only effective method—have adopted legislation under which inheritance taxes are not imposed upon property of this

sort of a nonresident, when the state of domicile does not impose such a tax upon such property of a nonresident.

Reference here may be made to the conference held in Washington in February, 1925, attended by delegates from twenty-five States and unofficial representatives of eight other States at which a committee was appointed to review the inheritance tax situation. This committee submitted its report to the Second National Conference on State and Inheritance Taxation held at New Orleans in November, 1925.

The report, after reviewing the chaotic condition that existed in the various systems of inheritance taxation among the several states recommended:

> "Intangible personal property should be taxed only by the state of the domicile of the decedent."

As a result of this conference reciprocal tax legislation has been enacted by many of the states. The effect of this legislation is that each state agrees not to tax intangible personal property of a decedent who was domiciled in another state if similar treatment is accorded by such state with respect to residents of the state enacting the law. The effect is that one state death tax, and only one, is exacted with respect to intangible personal property and that tax is paid to the state of the domicile of the deceased owner. New York was the first state to enact a reciprocal law. Pennsylvania followed next and shortly afterwards similar provisions were enacted by Massachusetts and Connecticut. At the present time the States of California, Connecticut, Illinois, Georgia, Maine, Maryland, New Hampshire, Ohio, Oregon and Pennsylvania have such re-

ciprocal tax statutes, while the States of Alabama, Florida and Nevada and the District of Columbia do not impose any inheritance tax and the States of Colorado, Delaware, Massachusetts, New Jersey, Rhode Island, Tennessee and Vermont do not tax intangible personal property of non-resident decedents. Today twenty states including most of the largest, most wealthy, and most populous states do not impose taxes upon the intangible personal property of non-residents, if the non-resident was domiciled in a state which has enacted similar legislation or does not tax the transfer of intangible property of a non-resident held within its borders. In this reciprocity movement Liberty Bonds have been treated as intangible property.

A decision that Liberty Bonds held outside the state at the time of death could not be taxed by the domicile of the owner would result in a breakdown of this reciprocity movement. The breakdown would follow from the fact that it would be possible to move the bonds to states which do not impose death taxes.

Liberty Bonds are necessarily included in such intangible property. These bonds, like other intangibles, constitute liquid wealth. They flow readily in economic channels and would find their way to those places where because of the absence of inheritance taxes, the return would be enhanced. There is no class of intangible personal property including Liberty Bonds that could not find a wide open road to tax evasion. The ultimate result could only be that in the end the States would find themselves compelled to abandon inheritance taxation for it would not be possible to maintain an adequate and rational system of inheritance taxation in the United States, without the power to tax the succession to such property.

The jurisdiction of the domicile is the only one which is in a position to secure the information necessary to levy a tax upon the transfer of a decedent's intangibles wherever held, and to enforce such a tax. Rarely does it happen that the administration can be avoided in the state of domicile, for it is there that the decedent has his real property and his tangible personal property; it is there that he is known and it is there that his personal representatives must submit themselves to the jurisdiction of the probate court.

We submit that there is no distinction between corporate and governmental bonds which requires this court to depart from its previous decision in *Carpenter* v. *Pennsylvania,* 17 How. 456, confirmed in *Orr* v. *Gilman,* 183 U. S. 278, and to extend the Fourteenth Amendment so as to render virtually impossible the collection of a succession tax upon governmental and municipal bonds by the state of the domicile.

In respect to cash, money and bank notes, the amount of the tax is inconsequential and this would ordinarily be the case. The question is one of the power of the state of domicile to impose a succession tax, and money, bank notes and cash are peculiarly attached to the person of the owner. They are mobile and easily concealed. The ease with which gold could be moved about and was formerly kept close to the owner is the fact which gave rise to the doctrine of *mobilia.*

There is no reason why this class of property should escape the taxing power of the state of domicile and why opportunities for its concealment should be multiplied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, Petitioner, vs. ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, on Writ of Certiorari to the Superior Court of Fairfield County, State of Connecticut.	No. 190
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, etc., Plaintiffs-in-Error, vs. WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, in Error to the Superior Court of the State of Connecticut.	No. 191

BRIEF FOR PLAINTIFFS-IN-ERROR IN No. 191 AND RESPONDENTS IN No. 190.

Preliminary Statement—The Federal Questions Involved.

Arguments on two appeals to this court arising out of a single judgment entered by the Superior Court of the

State of Connecticut pursuant to the opinion and advice of the Supreme Court of Errors of that state are presented in this brief. The case is reported below as *Silberman* v. *Blodgett*, 105 Conn. 192.

The case originated in the determination of the Tax Commissioner of the State of Connecticut that there was due to the state a succession tax on the entire estate, wherever situated, of Robert B. Hirsch, who died on September 23, 1924, a resident of Stamford, Conn. The net taxable estate was found to be $2,400,694.79, and the tax fixed by the Tax Commissioner at $188,780.58.

The property so taxed may for the purposes of these appeals be divided into three classes:

(a) Real estate and tangible personal property consisting of furniture, live stock and equipment physically situated in Stamford; three shares of stock in a Connecticut corporation; and a debt due to the decedent from a resident of Stamford; the aggregate value of such property being $49,097.27.

(b) United States Liberty Bonds and Treasury Certificates, payable to bearer, physically situated in the State of New York at the time of and for a long time, prior to the decedent's death, and cash on hand in New York, of the aggregate value of $615,408.65.

(c) The decedent's interest in the limited partnership of Wm. Openhym & Sons, organized under New York law and having its principal office there; shares of stock in New York, New Jersey and Canadian corporations and the proceeds of a policy of life insurance payable to the decedent's estate, the certificates and policy being physically situated at the time of the decedent's death and for a long time

prior thereto in the State of New York; and a savings account in the National City Bank of New York City; the aggregate value of these items of property being $1,980,038.26.

The executors have throughout conceded the right of the State of Connecticut to tax the succession to the property described in paragraph (a) above.

As to the property included in paragraphs (b) and (c), it was conceded that the applicable statute of the State of Connecticut, Chapter 190, Laws of 1923, attempted to levy a tax on the succession thereto—it purported to tax all property belonging to a resident decedent except foreign realty—but the executors protested that, so applied, it was unconstitutional and void, for taking property without due process of law in violation of the 14th Amendment to the Constitution of the United States, and for failing to give full faith and credit to the public acts, records and judicial proceedings of the State of New York in violation of Section 1 of Article 4 of the Constitution of the United States.

The substance of the decision and the judgment was that the property enumerated in paragraph (b) above was tangible personal property, and hence under the decision of this court in *Frick* v. *Pennsylvania,* 268 U. S. 473, a tax on the succession thereto took property without due process of law in violation of the 14th Amendment; but as to the property listed in (c) above, the tax on the succession thereto was constitutional; and, furthermore, that there was no refusal to give full faith and credit to the public acts, records and judicial proceedings of the State of New York in any respect. As a result of this decision, the amount of the tax was reduced to $138,014.61.

The judgment of the Superior Court, given on the advice and direction of the Supreme Court of Errors, was

entered on December 10, 1926 (R. 78). From it, both parties have sought relief in this court.

From so much of the decision as held the statute constitutional in levying a tax on the succession to the property enumerated in (c) above, a writ of error from this court was allowed the executors on February 18, 1927 (R. 91), by the Hon. George W. Wheeler, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut. This writ, together with the petition for the writ, the assignments of error, the judge's certificate, the bond and the return, were filed on February 23, 1927 (R. 81, 85, 90, 92). This proceeding is No. 191, October Term, 1927.

The parties secured from Judge Wheeler a certificate showing that the validity of the statute under the Federal Constitution was drawn in question, that the decision and judgment in the case was in favor of the validity of the statute in respect to the property in paragraph (c), and that under Connecticut practice the judgment entered in the Superior Court on the advice and opinion of the Supreme Court of Errors was a final judgment and decree in the highest court of the State of Connecticut in which a decision in the suit could be had (R. 92-93). These facts also appear in numerous other parts of the brief (R. 4-5, 22-24, 76-80, 83-84).

The case, therefore, seems to be squarely within Section 237 (a) of the Judicial Code in its present form.

So far as No. 190 is concerned, the certificate just mentioned shows that there was also drawn in question the validity of the same statute on the same grounds, so far as it purported to tax the succession to the decedent's interest in the bearer United States Liberty Bonds and Treasury Certificates and cash on hand physically situated in the State of New York at the time of decedent's death, and that the decision as to these items was against

the validity of the statute (R. 93). To review this part of the decision the petitioner in No. 190 sought and secured the writ of certiorari (R. 95).

Because the two appeals arose from the same judgment and on the same record, and because the issues in the two appeals were to a considerable extent closely related, counsel for the parties stipulated that only one record should be printed and that the two cases should be briefed together (R. 96).

Assignments of Error.

The plaintiffs-in-error intend to urge all of the assignments of error filed in No. 191 (R. 85-89), but inasmuch as the assignments as they appear in the record were set forth at some length so that they might be technically complete, we think it may be helpful to the court if we give the substance of them.

The first, third, fifth, sixth and ninth assignments all relate to the taking of property without due process of law, while the second, fourth, seventh, eighth and tenth assignments complain of precisely the same phase of the decision or judgment, but in respect to the denial of full faith and credit to the public acts, records and judicial proceedings of the State of New York. All of the assignments are limited to so much of the judgment as relates to the succession tax on the decedent's partnership interest, stocks of corporations not organized under the laws of Connecticut, proceeds of the life insurance policy and savings bank deposits. With these qualifications, the first and second assignments complain of the judgment that Chapter 190 of the Public Acts of 1923 of Connecticut was valid; the third and fourth assignments complain of the judgment that the tax imposed by Chapter 190 was valid; the fifth and seventh assignments complain of the judgment that

your plaintiffs-in-error pay to the treasury of the State of Connecticut $138,014.61 as the succession tax due under Chapter 190; the sixth and eighth assignments complain of the judgment that the computation made by the Tax Commissioner was valid and correct; and the ninth and tenth assignments allege error in the Superior Court in sustaining the order and decree of the Probate Court approving the computation of the tax and sustaining it.

Statement of Facts.

Robert B. Hirsch died on September 23, 1924, domiciled at Stamford, Conn., and leaving a last will and testament (R. 6).

His estate at the time of his death was valued at $2,645,065.85, and, less deductions, the net taxable estate was appraised at $2,400,694.79 (R. 49). The gross estate consisted of certain real estate, furniture and miscellaneous personal property physically located in Stamford, valued at $46,301.75 (R. 7, pars. 3 and 4); bonds valued at $615,642.84, physically located in the State of New York, of which those due from Connecticut residents or corporations were valued only at $521.67, and the balance were Liberty Bonds and United States Treasury Certificates, payable to bearer (these Liberty Bonds being his individual property and distinct from the Liberty Bonds owned by the partnership) (R. 7, pars. 3 and 5; 24, Exh. A; 55-56; 79, pars. 3 and 4); stocks of New York, New Jersey, Canadian and Connecticut corporations, valued at $277,984.25, the certificates being all physically located in the State of New York, of which the certificates issued by Connecticut corporations were worth only $120 (R. 7, pars. 3 and 5; 25, Exh. B; 79, par. 5); a share in the New York limited partnership of Wm. Openhym & Sons, valued at $1,687,245.34 (R. 7, par. 3); and

miscellaneous intangible property valued at $17,891.67, of which $287.48 was cash on hand in New York, $14,928.67 was life insurance and savings bank deposits due from New York corporations, and $2,675.52 was a debt due from a resident of Connecticut (R. 7-8, pars. 3 and 6; 26, Exh. C).

These items of property we classified in our preliminary statement according to the legal questions here presented (*supra*, p. 2).

The business of Wm. Openhym & Sons was a limited partnership organized under New York law and having its principal place of business in New York City, all of the partners with the exception of the decedent being residents of the State of New York (R. 8). Details of the partnership agreement and property are given at some length in the stipulated facts (R. 8-10, pars. 7-13).

Decedent left a will and two codicils, all executed in New York City and conforming to the requirements of both New York and Connecticut law (R. 6, par. 1).

Of the five surviving executors named in the will none were residents of Connecticut; four were residents of New York and one of New Jersey, the latter doing business in New York (R. 6, par. 2).

All of the trustees named throughout the will are residents of or corporations organized under the laws of the State of New York (R. 10-13, par. 14).

The decedent's will and codicils are summarized in the record (R. 10-15, par. 14). For the purposes of this case, only the following facts seem important:

Only four of the beneficiaries, Harriet and Aleen Lassner, Josephine French and Josephine Thellian, *were residents of Connecticut* (R. 19, par. 20). The only outright gifts to these beneficiaries in Connecticut were the gift of the real estate and tangible personalty in Stamford valued at $46,301.75 to Harriet Lassner (R. 10, 51) and $20,000

to Josephine French (R. 52). In addition, trusts were created, one of $314,820.11, in which Harriet and Aleen Lassner were beneficiaries (R. 51), and one of $10,000, of which Josephine Thellian was the life beneficiary, the present value of the gift being $4,391.16, and the principal reverting to the residuary estate on her death (R. 52). *The trustees of these trusts were all residents of New York.*

Of the balance of the estate, there were various gifts outright and gifts of life estates and remainders payable in cash to individuals, non-residents of Connecticut (R. 10-11, 14-15, 51-54), and cash bequests totaling $75,000 to five charitable and educational corporations organized under the laws of the State of New York (R. 11, par. Eleventh of will; 19, par. 21; 52). Then the residue of the estate, amounting to $1,795,208.53, was given to twelve named trustees for the purpose of investing the principal and applying the net income to the free education of poor and deserving children in the Ethical Culture School, maintained by the Society of Ethical Culture in New York City, and of poor and deserving young men and women who are recommended by the directors of the Society for the career of teachers (R. 11-13, par. Fourteenth of will; 54). This gift was recognized to be for educational and charitable purposes (R. 19, par. 22; 36, last item; R. 41-48, Exhs. L and M).

The original will and codicils were filed and probated in the Surrogates' Court in New York County as a court of original jurisdiction on November 28, 1924, in accordance with the requirements and practice of New York law (R. 15). The petition for probate showed that the decedent was a resident of Connecticut at the time of his death (R. 28), and the letters testamentary so recited (R. 31). The ground stated for invoking jurisdiction of the New York court was the

fact that the decedent left personal property exceeding in value the sum of $10,000 within New York County (R. 28). The decree admitting the will to probate is in the same form as that for a domiciled resident and adjudged that it be admitted as the last will and testament "valid to pass real and personal property" (R. 30, Exh. F). The letters testamentary which were thereupon issued recited that the will had been approved and allowed; that the deceased was a resident of Connecticut and left property in New York *"by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testator and also the auditing, allowing and final discharging the account thereof doth belong unto us,"* and thereupon granted *"the administration of all and singular the goods, chattels and credits of the said deceased in any way concerning his will"* to the five executors (R. 31, Exh. G).

The executors thereupon proceeded with the administration of the estate in accordance with the directions and practice of the New York court. They secured an order to publish notice to creditors to present claims (R. 15). The trustees named in the various paragraphs of the will qualified in the New York Surrogates' Court in accordance with the New York practice (R. 15). The executors petitioned the Surrogates' Court for the appointment of a transfer tax appraiser, who was appointed on January 19, 1925, and the executors filed schedules with him (R. 15). The executors opened a bank account in New York City, in which all moneys of the estate collected have been deposited and through which they have been disbursed, and said bank account is the only one the executors have had (R. 15-16). From these moneys in New York the executors paid all of the cash bequests and set up all of the special trusts established in the will, paid all of the decedent's debts and the estate and transfer taxes other than that of Connecticut, expending $762,325.68 in so doing

(R. 16), and in addition they have paid to the residuary trustees for the account of the residuary trust established by paragraph 14 of the will a sum in excess of $780,000.

The executors also transferred all the stocks (except the three shares of the Stamford Theatre, Inc.) owned by the decedent, which stocks were registered in his name and unendorsed at the time of his death, and secured payment of the decedent's insurance, by exhibiting to the transfer agents and to the insurance company certificates of the letters testamentary issued by the New York court and waivers from the New York Tax Department (R. 16).

The executors took no steps to qualify in Connecticut until January 8, 1925. Then, pursuant to Section 4956 of the Connecticut statutes, they filed an exemplified copy of the will and codicils and the record of proceedings in the New York court, duly authenticated by the New York court, and requested letters testamentary (R. 18, par. 19; 38, Exh. J). Proceedings were thereupon held by the Court of Probate in Stamford, the exemplified record was approved and filed and letters testamentary were granted (R. 18-19; 40, Exh. K).

Under the New York tax law in effect at the date of the decedent's death, there was taxable the transfer of the interest of the decedent in the New York partnership and of the stock owned by him in New York corporations, and these were valued by the transfer tax appraiser appointed by the New York court at $1,938,341.56. There were then exempted from the New York tax the gifts to the five educational and charitable corporations and to the trustees of the residuary estate, and as a result the transfer tax assessed by the State of New York was reduced to $19,166.04 (R. 16-18, par. 17; 32-38, Exhs. H and I).

Tax proceedings were instituted in Connecticut, the executors filed a statement of the decedent's property under oath and the Tax Commissioner filed his report and

computation of tax on September 15, 1925 (R. 20). He reported that the decedent's entire estate was taxable in Connecticut and computed his tax on that theory, the total amount thereof amounting to $188,780.58 (R. 48, Exh. N).

The executors presented objections to the determination of the tax and a hearing thereon was held by the Court of Probate in Stamford. The grounds of the executors' objections were in substance those later filed as the reasons for appeal (R. 4, 20-21, par. 25).

Following the hearing on these objections before the Probate Judge, the Probate Court on December 4, 1925, entered an order confirming the computation of the Connecticut Tax Commissioner and overruling the executors' objections and directing the payment of the tax as computed (R. 21, par. 26). From this determination the executors appealed to the Superior Court for the County of Fairfield, the reasons for appeal being in substance that by the tax sought to be imposed, property was taken without due process of law, and full faith and credit were denied the laws of the State of New York, all in violation of the Federal Constitution (R. 4-6).

The succeeding steps and the decision are described in our preliminary statement.

By stipulation between the parties the payment of the tax claimed by the State of Connecticut has been suspended pending final determination by this court of the constitutionality of the Connecticut statute and the tax.

The Connecticut Statute Involved.

The Connecticut succession tax act applicable to the decedent's estate is Chapter 190, Public Acts of 1923 of the State of Connecticut. The section of that act under which the tax was levied reads as follows:

> "Section 1. All property and any interest therein owned by a resident of this state at the time of his decease, and all real estate within this state owned by a nonresident of this state at the time of his decease, which shall pass by will or inheritance under the laws of this state * * * shall be subject to the tax herein prescribed. * * * The provisions of this act shall not apply to real estate situated without the state."

Analysis of the Connecticut Decision.

The discussion in the opinion of the Connecticut court of the problems involved in this case is full and includes numerous quotations from decisions. We have attempted to summarize the opinion in order to emphasize the principles on which the decision turned and the relation of the decision to our argument.

The facts as stated by the Connecticut court agree with our understanding of the record, except in one respect. The court states that the partnership assets included Connecticut real estate. Probably in making this assertion, the court had in mind the fact that the partnership owned stock of a New Jersey corporation which in turn owned a plant situated in Connecticut (R. 9, par. 9 [j]).

Summarizing that part of the opinion dealing with the law:

1. A succession tax is levied upon the right or privilege of succession to the property of a decedent and not upon the property itself. A succession tax is an excise dependent solely upon domicile and wholly independent of any right to impose a direct property tax; a property tax is an ad valorem tax dependent on the situs of the property. The first may properly depend on a valuation of property included in the succession on which the state could not impose a direct tax (R. 62, 64).

2. The general rule of law and that of the Connecticut courts and the principle upon which the Connecticut succession tax acts are based is that the right or privilege of succeeding to the personal property of a decedent, whether it is located within or without the state, is given by the laws of the state of his domicile, by which law alone it passes and its distribution and disposition are determined; and that accordingly the state of domicile has power to levy a tax upon the exercise of this right or privilege (R. 62, 63, 64).

3. Property may have an actual situs in another state and as a result that state may have jurisdiction for certain purposes in the course of administration, such as that of appropriating a sufficient amount to satisfy the claims of local creditors, and may apply its own policy, but such administration is always ancillary and in aid of the principal administration at the domicile and all the property is regarded as within the jurisdiction of the domicile for the purposes of administration and distribution. The statutes of more than four-fifths of the states purport to levy such a tax and the state decisions upheld them and

were generally sustained by the United States Supreme Court until the decision in the *Frick* case (R. 64, 65, 66).

4. The decision in the *Frick* case overturned a settled and established principle of probate law when it held that as to tangible personalty the power to regulate its transmission, administration and distribution lay with the state of situs and not the state of domicile (R. 65, 66).

5. The *Frick* decision did not apply to intangible property and it seems still to be the rule of the United States Supreme Court that as to intangibles the tax is on the right of succession and not on the property, that this succession takes place by virtue of the law of domicile, that the domicile is not prohibited from levying a tax thereon because the state of situs also taxes it, and that even in cases of ad valorem taxation the intangible property has a situs at the owner's domicile, though it may also have acquired a "business situs" elsewhere. There is no authority that such property can have a situs at the debtor's domicile and independent of the creditor's domicile. The law of Connecticut is in accordance with this (R. 64, 65, 66, 67-69, 70, 71).

6. Since the tax is not on a decedent's property, there is no occasion to determine its situs. Only domicile is of importance because the right of transfer exists by reason thereof. The granting of the right to dispose of the property is the privilege which is taxed. The act granting the right of transfer must be within the control of the state imposing the tax. The fallacy in the reasoning which vests jurisdiction to levy a succession tax in the state having the control of the property, as distinguished from the control of the transfer, has resulted in confusion (R. 64, 70-71).

7. The certificates of stock and the partnership interest are intangible property and can be taxed both where they are organized and at the decedent's domicile. The partnership, organized under the limited partnership act of New York, was subject to New York law substantially as a corporation organized there would have been (R. 72-74). The right to the proceeds of the life insurance policy and to the savings bank account vested in the decedent's estate as a creditor of the New York debtors and were subject to the succession tax of Connecticut (R. 75).

8. While the United States Bonds and Treasury Certificates are, strictly speaking, mere evidences of debt, such public securities are treated as tangible personal property and have come to be recognized as such, and under the *Frick* case they are subject to a transfer tax in New York where they were found and nowhere else. Cash is to be treated similarly (R. 74-75).

9. The claim for exemption of the bequests to New York charitable and educational corporations must be denied under the 1923 Act. The change made in 1925 which would exempt such bequests has no application (R. 76).

10. The net estate taxable by Connecticut must be reduced by deducting the value of the United States Bonds, Treasury Certificates and cash and the amount of the transfer tax paid to the State of New York on the value of the corporate stock and the limited partnership under the authority of the *Frick* case (R. 76).

POINT I.

The real complaint of the petitioner in No. 190 is directed to the determination of the Connecticut court that the Liberty Bonds, Treasury Certificates and cash on hand were in the nature of tangible personal property. This was a question of local law, with the decision of which this court has no concern. The decision on the federal question that the succession to tangible personal property physically situated outside Connecticut cannot constitutionally be taxed by that state follows the rule of this court.

Analysis of the opinion of the Connecticut court shows clearly the decision of two separate questions in relation to the tax on the succession to the Liberty Bonds, Treasury Certificates and cash on hand. (1) The court said that the bonds and Treasury Certificates "are strictly speaking mere evidences of debt and intangible personalty," but that they "pass from hand to hand on delivery [and] are treated as a species of tangible personal property and have come to be recognized as such" (R. 74), and accordingly it held that the practical considerations set forth "necessarily operate to convert United States Bonds and Treasury Certificates into tangible personal property" (R. 75). The cash on hand in New York was treated similarly (R. 75). (2) As tangible personal property, under *Frick* v. *Pennsylvania*, 268 U. S. 473, these items "are subject to a transfer tax in New York where they were found and nowhere else" (R. 75).

If these items of property were tangible in their nature, then it is obvious that the second question has been correctly decided. The *Frick* decision is precisely in point.

With the question whether these items were tangible this court is not concerned, if that question is one of local

law and if the answer is not an evasion of the federal question.

This rule hardly needs citation of authority to support it.

Patently there was no evasion of the federal question. The decision of that issue, against the constitutionality of the state statute, was the deciding factor in the case. The opinion shows throughout that the rule of the *Frick* case was applied, and the conclusion that the statute was unconstitutional was reached, with the greatest reluctance, but nevertheless the court felt bound by, and followed, the federal rule.

The only remaining question is whether the nature of these items of property was purely a matter of local law. We think it was clearly such, both as a matter of reason and under the decisions of this court.

Fox River Paper Co. v. *Railroad Commission,* 274 U. S. 651.
Waggoner v. *Wichita County,* 273 U. S. 113.
Hines Yellow Pine Trustees v. *Martin,* 268 U. S. 458.
Nickel v. *Cole,* 256 U. S. 222, 226.
Consolidated Turnpike v. *Norfolk, etc., Railway Co.,* 228 U. S. 596.
Moffitt v. *Kelly,* 218 U. S. 400.
Sauer v. *City of New York,* 206 U. S. 536.
Orr v. *Gilman,* 183 U. S. 278.
Kaukauna Water Power Co. v. *Green Bay, etc., Co.,* 142 U. S. 254.
Suydam v. *Williamson,* 65 U. S. 427.

See also additional cases cited, pages 3 and 4 of our brief in opposition to petition for writ of certiorari.

These cases all held in substance that the determination of the state courts on the nature of particular property

and property rights within the state was a question of local law upon which the determination of the state courts was conclusive and final and which this court had no jurisdiction to review or alter. It is difficult to conceive a question more clearly one of local law than that presented here whether the securities and cash were tangible or intangible in their nature. It is precisely like the question presented to this court in the *Waggoner* case, *supra*, where the state court decided that the interest of a lessor in an oil well on a royalty basis was realty, and is within the rule laid down by this court in a long line of cases that "the rules of unwritten law of a state affecting property within the state are peculiarly questions of local law to be ascertained and established by the state courts" (*Hines Yellow Pine Trustees* v. *Martin, supra,* at p. 462). We need hardly recall to this court's recollection the numberless instances in which states establish rules as to the classification of property for various purposes.

Nor would it be any objection to the binding effect of the state decision on the question of local law if the rule applied were contrary to the rule of law established in like cases by this court,

> *Pennsylvania Railroad Co.* v. *Hughes,* 191 U. S. 477, 486,
> *Hines Yellow Pine Trustees* v. *Martin, supra,* at p. 464,

nor if the decision of the state court in question amounted to a reversal or a modification of the pre-existing rule established by earlier state decisions,

> *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444,
> *Patterson* v. *Colorado* 205 U. S. 454, 460.

nor if the decision of the state court was erroneous.

Bonner v. *Gorman*, 213 U. S. 86, 91.
Phoenix Insurance Co. v. *Tennessee*, 161 U. S. 174, 185.

It is true that in many cases the opinion of this court shows an examination of the state law from which the conclusion is drawn that the rule announced by the court in the particular case was in accordance with the law. But we do not understand that this examination is made to determine whether the conclusion of the state court was or was not correct, but to determine whether, as the thought was expressed in *Truax* v. *Corrigan*, 257 U. S. 312, at 324, "the finding * * * is without substantial support" and whether as a result there is a deliberate evasion of the federal question. That question of evasion is not present in this case, and hence the Supreme Court of Errors of the State of Connecticut had the final jurisdiction to determine the nature of various property interests within the state.

As a matter of fact, the cases cited in the next point establish, we think, that the decision of the Connecticut court was correct as a matter of general law, certainly was not inconsistent with earlier decisions of the Connecticut courts, and was founded upon fact and common practice and understanding. Apparently the question whether public securities are tangible or intangible in their nature had not been squarely decided by a Connecticut court prior to the decision in the present case. The decisions in certain earlier Connecticut cases that such bonds located outside the State of Connecticut were subject to the Connecticut succession tax (*Hopkins' Appeal*, 77 Conn. 644, is an example) did not involve the question of the nature of the bonds. As the Connecticut court in the present case points out, the theory of the Connecticut tax

was that all personal property of a resident decedent, no matter where located, and whether tangible or intangible in nature, was subject to the Connecticut succession tax because jurisdiction to impose that tax depended on the state's control of the right to succeed thereto, and not on the situs or nature of the property. In certain earlier Connecticut decisions there had been approved the rule of the common law that debts represented by specialties had a situs where the specialty was.

Slocum v. *Sanford*, 2 Conn. 533.
Holcomb v. *Phelps*, 16 Conn. 127, 134.

But the specific question on the nature of public securities seems first to have been presented in the present case, and the distinction betwen public and private securities first to have been enunciated in a subsequent case, *Lockwood* v. *Blodgett*, 106 Conn. 525, where the court reaffirmed its decision in the present case that public securities were tangible in their nature, but held that private securities were intangible.

It seems to us that the present case presents a simple issue, where there must first be determined a question of local law and then a federal question arising from that determination; that the local question was determined by the state court without evasion of the federal question; that the federal question was thereupon determined correctly; and that this court, therefore, under the rule of the cases cited above and in our brief in opposition to the petition for the writ of certiorari, is not concerned with the decision of the local question.

POINT II.

The Liberty Bonds and Treasury Certificates payable to bearer and the cash on hand owned by the decedent were tangible in their nature. Since they were located outside the State of Connecticut at the time of his death, the Connecticut statute purporting to levy a tax on their transfer or succession thereto was unconstitutional and void.

At the time of the decedent's death he owned United States Liberty Bonds and Treasury Certificates, payable to bearer, of the aggregate value of $615,121.17. For convenience, these are collectively spoken of as Liberty Bonds throughout this point. At the time of his death, and for a long time prior thereto, they had been physically located in safe deposit boxes in the State of New York (R. 7, par.5; R. 24, Exh. A; R. 79, pars. 3 and 4).*

In addition, at the time of his death the decedent had $237.48 in coins and bank notes, described as "cash on hand", physically located in the State of New York (R. 8, par. 6; R. 26, Exh. C; R. 80, par. 9).

These items of property the Connecticut court decided to be tangible in nature (R. 74-75), and accordingly, under the rule of *Frick* v. *Pennsylvania, supra,* it decided that the succession thereto could not constitutionally be taxed by the State of Connecticut and that the statute attempting to tax them was to that extent unconstitutional

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* It was agreed between counsel for the parties that for the purpose of this case these bonds and treasury certificates were the individual property of the decedent and were not partnership property, and accordingly they were not taxed by the State of New York although the interest of the decedent in the partnership was so taxed.

The decedent owned bonds of a Stamford golf club physically located in New York valued at $521.67. The tax on them is so minor that we have not complicated the material issues in the case by arguing whether Connecticut had jurisdiction to tax bonds of private corporations physically located in New York.

and void as taking property without due process of law in violation of the 14th Amendment to the Constitution of the United States (R. 76, answer to questions 4, 5, 10 and 12, R. 60-61; R. 79-80, pars. 3, 4, 9 and 11).

Bonds.

The decision that the bonds were tangible personal property or sufficiently of that nature so that they were subject to identically the same rules of taxation is in accordance with the decisions of this court and the general rule of law, and certainly is in accordance with actual fact and the practice in dealing with such securities.

Foreign-Held Bonds Case, 15 Wall. 300.
New Orleans v. *Stempel,* 175 U. S. 309, especially 321-323.
Blackstone v. *Miller,* 188 U. S. 189, 206.
Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S. 395, 400.
Buck v. *Beach,* 206 U. S. 392, 403, 407, 412-413.
Selliger v. *Kentucky,* 213 U. S. 200, 204.
Wheeler v. *New York,* 233 U. S. 434, and cases cited p. 440.
Walker v. *Jack,* 88 Fed. 576, 578.
Western Ins. Co. v. *Halliday,* 110 Fed. 259, 263; same case, 127 Fed. 830, 834.
DeGanay v. *Lederer,* 239 Fed. 568, 573; aff'd 250 U. S. 376, 381.
People v. *Home Ins. Co.,* 29 Cal. 533, 544.
Westinghouse E. & M. Co. v. *Los Angeles County,* 188 Cal. 491, 494.
Callahan v. *Woodbridge,* 171 Mass. 595, 598.
State ex rel. Dunnica v. *County Court,* 69 Mo. 454, 457.
People v. *Ogdenburgh,* 48 N. Y. 390, 397.

Matter of Whiting, 150 N. Y. 27, 29.
Hall v. *Miller*, 102 Tex. 289, 295.
Texas v. *Fid. & Dep. Co.*, 35 Tex. Civ. App. 214, 218.
Attorney General v. *Glendining*, 92 L. T. N. S. 87.
Hoffman & Wood, *Taxation of Federal, State & Municipal Bonds*, page 28, Sec. 74.
Burroughs on *Taxation*, page 51.

It would be useless to extend this brief by the pertinent and persuasive quotations available in the foregoing cases. The *Foreign-Held Bonds Case* and *New Orleans* v. *Stempel* are probably the leading cases on the subject.

Probably the rule that public securities as distinguished from ordinary debts and other evidences of indebtedness are tangible in their nature and exist where the securities are found has a double origin, in part historical and in part based on commercial practice.

An extended discussion of the history of bonds and similar specialties at common law, showing how the distinction between them and other debts and evidences of debt arose, is hardly justified. Such a study would probably throw considerable light on the early decisions, but the historical origin has already been noted by this court in a number of the decisions cited. That origin seems of much less importance to-day than the practical considerations which would give rise to this distinction, whether there were an historical basis or not. As a matter of fact, the historical development of bonds has already been presented to this court in the learned discussion set forth as an appendix to the brief on behalf of the executors in the case of *Wheeler* v. *New York, supra*. The appendix commences at page 26 of the brief.

While history may have given the impetus to the early decisions that securities had a tangible nature, commer-

cial practice and the cold facts of the situation in the last century have given a basis of solid fact to the principle. What is the property of the security owner primarily except the piece of paper which he owns, representing the debtor's agreement to pay? To be sure, in some circumstances, if that piece of paper is lost or destroyed, he may have recourse against the debtor upon the underlying obligation, but in every instance this recourse is recognized as a secondary remedy to be called into play only when the physical paper cannot be produced and made the basis of the claim. The debtor is always entitled to be secured against a conflicting claim from one who produces the instrument in his own hands. This by itself is the best evidence that the primary property is the security itself. So, too, when the purchaser buys the obligation, what he receives is not a new promise from the obligor but the physical certificate of interest originally issued by the debtor, and it is that piece of paper which he guards as his property and that paper which he sells when he disposes of it.

The whole property right which inheres in him is based upon and relates to that very tangible asset, and in many cases without it he cannot recover at all. Doubtless this is one factor in the distinction between state and municipal bonds and others, because in the majority of instances the only evidence of obligation which such a debtor will recognize is the physical instrument itself. If that disappear, the owner has no recourse at all. His property has gone as truly as though it were a piece of furniture or an article of clothing lost or destroyed. To some extent, this situation may have been modified by the practice of registration of securities, but in the present instance all of the bonds owned by the decedent were payable to bearer and the enforceability of his claim was subject to their continuance in his possession.

The court's decision, therefore, rests on fact, common sense and current business practice, and any other decision would have exalted a theory and perfection of form above these practical considerations. The course followed was a healthy one and represents the practice of courts in touch with modern conditions and needs.

Cash on Hand.

It is hardly necessary to argue at length that the cash on hand was tangible in its nature. So far as it consisted of metal coins this must be conceded. So far as it consisted of bank notes it is true that those notes on the face show that they are only a promise by the bank or government, as the case may be, to pay gold or silver on demand. But this technical characterization as a mere promise to pay is so completely over-ridden by common practice and recognition of these notes as the money itself that we hardly think a serious argument will be made that the bank notes were intangible in their nature.

Conclusions.

The bonds and the cash on hand being tangible in nature, the rule of the *Frick* case is obviously applicable. It is needless to recite the principles there established. That decision did not turn on the fact that the property consisted of furniture and pictures, but on the fact that it was tangible personal property, and the decision must necessarily apply equally to any other tangible personal property.

If there is any doubt of the fact that the transfer of these bonds and the cash is accomplished by the New York courts under New York law, as the transfer of the pictures and furniture was in the *Frick* case, that fact will appear from our discussion in the next point (*infra*, p. 32 *et seq.*).

In the petition for a writ of certiorari and the accompanying brief the petitioner in No. 190 suggested that the fact that these bonds and cash were not subject to a transfer tax by New York created some right in the State of Connecticut to tax them. The fact that New York imposed no transfer tax on them is immaterial. The only question is whether the bonds and cash are tangible in nature and come within the *Frick* case. Whether New York taxes them or not throws no light on this question. In the *Frick* case it was equally true that New York levied no tax on the works of art purely as a matter of policy. The state could have taxed bonds had it so desired. From 1892 until 1911 the New York tax law provided for taxation of transfers of the "property of a nonresident within the state" and this was held to include bonds, whether of resident or nonresident obligors, if the instruments were physically within the state.

Matter of Whiting, 150 N. Y. 27.
Matter of Morgan, 150 N. Y. 35.

If the legislature in recent years has deemed it better policy to exempt such property from taxation the exemption creates no right in another state which that state otherwise would not possess. And certainly taxation or freedom from taxation has no bearing on the tangibility of the property, nor the question whether its transfer is accomplished solely by New York law.

POINT III.

The statute of the State of Connecticut purporting to levy a tax on the succession to the intangible property, other than the Lassner account receivable and the stock of a Connecticut corporation, owned by the decedent at the time of his death, violates the 14th Amendment to the Constitution of the United States by taking property without due process of law.

Coming now to the issues presented in No. 191, we have already shown that, aside from the real estate and tangible personal property in Connecticut, the three shares of stock of a Connecticut corporation, and the Lassner account receivable amounting to $2,675.52, due the decedent from a resident of Connecticut, his estate consisted of an interest in a limited partnership organized under New York law and doing business in New York City, Liberty Bonds and Treasury Certificates and shares of stock in New York, New Jersey and Canadian corporations, a life insurance policy in a New York insurance company, cash on hand, and a savings account in a New York City bank, the bonds, cash, stock certificates and insurance policy all being physically situated in New York when the decedent died. The question is whether Connecticut constitutionally could tax the succession to this property.

Two principles in the law of inheritance taxation were well established and universally accepted before this court rendered its decision in the case of *Frick* v. *Pennsylvania*, 268 U. S. 473:

1. Jurisdiction to tax depends upon jurisdiction of the thing taxed.

2. The thing taxed in the case of transfer and succession tax statutes is the transfer or succession, and not the property or persons involved.

Foreign Held Bonds Case, 15 Wall. 300, 319.
Pullman's Car Co. v. *Penn.*, 141 U. S. 18.
U. S. v. *Perkins*, 163 U. S. 625.
Plummer v. *Coler*, 178 U. S. 115.
Eidman v. *Martinez*, 184 U. S. 578.
Buck v. *Beach*, 206 U. S. 392, 400.
Wheeler v. *Sohmer*, 233 U. S. 434, 446.
Colorado v. *Harbeck*, 232 N. Y. 71.

Since the laws of a state can have no extraterritorial force or effect, it followed that only those states could tax the transfer or succession by virtue of whose laws or within whose jurisdiction the transfer or succession took place.

The *Frick* decision modified neither of these principles, but it made a very substantial modification in the law as generally understood (1) by holding that the law of a decedent's domicile was not necessarily invoked to accomplish the transfer of his personal property and that if it was not, the domicile lacked jurisdiction to levy a tax on the transfer, and (2) by treating *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, and its companion cases, as having held that for transfer as well as general tax purposes exclusive situs of tangible personal property was its physical location.

The *Frick* case, however, dealt with tangible, not intangible, personalty. This court said that intangibles stood on a different footing from tangibles—just as it said in the *Union Refrigerator* case that the situs of tangibles for general taxation was distinguishable from situs for transfer tax purposes. But in view of the substantial change in the law accomplished by the *Frick* case and the exten-

sion of these new principles in *Wachovia Bank & Trust Co* v. *Doughton*, 272 U. S. 567, and the general development of the law of taxation, there is fully warranted a re-examination of the principles applicable to taxation of the transfer of or succession to intangible property.

It is true, of course, that intangible personalty is distinguishable in many features from tangible personalty, but it does not necessarily follow that the transfer of such intangibles may not take place in fact solely under the law of a state other than that of the owner's domicile and with no aid from the law of the domicile, nor that such intangibles cannot have a distinct situs away from the domicile inconsistent in fact with a situs there. The two questions specifically presented by this case are: (1) Did the law of the State of Connecticut aid the transfer of the intangible property involved in these appeals in any degree or did the transfer take place exclusively under and by virtue of the laws of New York? (2) Had these items of intangible property, for the purposes of this case, a situs outside the State of Connecticut inconsistent with a situs in that state?

Before we embark on the discussion of the law and the facts particularly pertinent in answering these questions, it may be helpful to make the following general observations:

Up to the time of the *Frick* decision it was generally stated—though not universally by any means, as we shall presently see—that in accomplishing the transfer of a decedent's personal property the law of his domicile was always called into play and the transfer depended on that law, and therefore the state of domicile could levy a tax on the transfer or succession. This argument is very forcefully expressed by the Connecticut court in the opinion in the present case.

Support for that principle seems to have been drawn from two theories, not often distinguished and perhaps not distinguishable, but which certainly on their face have no relation to each other. On the one hand, it was said that because by rules of comity the state having actual control of the personal property applied the law of the decedent's domicile in determining the descent and distribution of this personalty, the law of the domicile was actually necessary to accomplish the transfer; that the state of domicile, by establishing this law, created the privilege of transferring this property; and, therefore, because this law was essential to the transfer it could tax that transfer. On the other hand, it was also generally said that by virtue of the common law maxim *mobilia sequuntur personam* all the personal property of a decedent followed him to his domicile and had there its legal situs, and because it had its situs there its transfer was governed by the law of the domicile, and therefore the domicile could tax that transfer.

See 24 *Mich Law Rev.* 50, 51-52.

So far as the second theory was concerned, the same courts which declared that, for the purpose of transfer taxation, personal property had both an actual situs and a situs at domicile by fiction, said that, for the purpose of administration of the same property, or when general taxation of tangible personalty was concerned, the actual situs was exclusive. The inconsistency is palpable. But between adherence to precedent and the fact that the *Union Refrigerator* case expressly excepted cases of transfer taxation, many of the courts kept to the old terminology and held that in transfer tax cases the old rule *mobilia sequuntur personam* was still applicable though an actual situs was recognized at some place away from the domicile.

The other theory, that the law of the domicile was applied in accomplishing the transfer of property, no matter what its situs, was certainly not overturned by this court until the *Frick* case was decided, and, until then, the state courts declared that theory to be the law. Obviously, however, it was not the fact, and the *Frick* decision certainly establishes a new principle in discarding the old unsound fiction and declaring the law to rest on fact.

Now the question arises, what justification has either fiction for survival in the case of the transfer of intangible property? Are there not facts in the transfer of intangibles substantially like the facts in the transfer of tangibles and just as inconsistent with the fiction?

In answering these questions, it should be borne in mind that primarily the question is: Under what law and what jurisdiction was the transfer accomplished? The justification of a transfer tax is jurisdiction of the transfer, and that question of jurisdiction, therefore, alone is material. *The question of situs is important only as it bears on the solution of this primary question.* It is essential to notice that this fact was not only admitted but emphasized by the Connecticut court in its opinion in the present case, and that both in its own statement of the law and its quotations from earlier decisions the court stated expressly or by inference that the situs of certain intangibles involved was outside Connecticut, but considered that nevertheless the transfer depended on Connecticut law and hence was taxable.

Treating the question as one of *fact and actuality*, it certainly is not difficult to establish that the succession to the decedent's intangible property involved in these appeals was accomplished solely under the laws of the State of New York and through the aid of its courts, and that the Connecticut statutes and courts extended no aid to the succession and could not interfere with it. Similarly,

so far as the question of situs throws any light on this question of the control of the succession, we think it can be shown that *in fact* the intangible property involved had an exclusive situs in New York and that any situs given it in Connecticut through the fiction *mobilia sequuntur personam* is inconsistent with the actual fact.

It must necessarily follow that if the transfer of this property was accomplished solely by New York law and that Connecticut had no jurisdiction over it, then under the fundamental principles stated at the beginning of this point Connecticut had no jurisdiction to levy a succession tax as to the property here involved.

We shall devote the first part of the argument in this point to showing that in fact and in law the transfer depended exclusively on the statutes and the courts of New York. Then we shall support this contention by reference to the practice and law of other states. Lastly, we shall take up the question of the situs of such intangibles so far as it relates to jurisdiction over succession to them.

1. The succession to all of the intangible property involved in these appeals took place under and by virtue of the laws of the State of New York and the action of its courts without any aid from or intervention by the laws or the courts of the State of Connecticut.

(a) UNDER THE STATUTES OF THE STATE OF NEW YORK THE SURROGATES' COURT FOR NEW YORK COUNTY IS AUTHORIZED TO TAKE JURISDICTION OF AND ADMINISTER PROPERTY OF A NON-RESIDENT DECEDENT WITHIN THE STATE.

A material part of the laws of the State of New York relating to the distribution of estates, both testate and intestate, is to be found in the Decedent Estate Law, Chapter 18, Laws of New York, 1909, constituting Chapter

13 of the Consolidated Laws. Among the sections of this Act we find the following very significant provisions:

Section 22-A was added to the statute by the Laws of 1919, Chapter 294. This deals with the "validity of wills executed without the State" and prescribes in substance that such a will, executed as prescribed by the laws "either of the *place where executed* or of the testator's domicile," shall be as valid as if executed in accordance with New York laws, "provided, such will is in writing and subscribed by the testator."

Section 23 as last amended by the Laws of 1919, Chapter 294, declares "What wills may be proved" and reads:

> "A will of real or personal property, executed as prescribed by the laws of the state, or a will of real or personal property executed without the state *in the mode prescribed by the law, either of the place where executed or of the testator's domicile, provided such will is in writing and subscribed by the testator,* may be admitted to probate in this state."

The body of New York law relating to the administration of estates is contained in the Surrogate's Court Act, Chapter 928 of the Laws of 1920, as amended. This contains the following provisions:

Section 40 prescribes the general jurisdiction of the surrogate's court and enumerates, among other subjects, power to probate wills and grant letters testamentary, to control executors and trustees and settle their accounts, to appoint successors in place of trustees, to enforce the payment of debts and legacies and the distribution of estates, "to determine the validity, construction or effect of any disposition of property contained in any will proved in his court." *No distinction is made whether the decedent is resident or non-resident.*

Section 41 provides for securing jurisdiction of persons by citation, and Section 42 provides for jurisdiction of subject-matter when the "jurisdictional facts prescribed by statute" exist, so that in the second case the proceeding is really a proceeding *in rem*.

Then Section 45 defines the cases in which one surrogate's court has jurisdiction exclusive of every other. Subdivision 1 refers to resident decedents, and subdivision 2 to non-resident decedents who die within the county leaving personal property in the state. Then comes the section under which the Surrogate of New York County took jurisdiction in this case:

> "3. Where the decedent, *not being a resident of the state, died without the state, leaving personal property within that county*, and no other; or leaving personal property which has since his death, come into that county, and no other, and remains unadministered."

Then comes Section 47, which is so material that we quote it in full:

> "§ 47. Jurisdiction, how affected by locality of debts.
>
> For the purpose of conferring jurisdiction upon a surrogate's court, *a debt owing to a decedent by a resident of the state is regarded as personal property situated within the county where the debtor,* or either of two or more joint debtors, *resides;* and a debt owing to him by a domestic corporation is regarded as personal property situated within the county where the principal office of the corporation is situated. But the foregoing provision *does not apply to a debt evidenced by a bond, promissory note, or other instrument for the payment of money only,* in terms negotiable or payable to the bearer or holder. Such a debt, *whether the debtor is a resident or a non-resident of the state,*

> *or a foreign or a domestic government*, state, county, public officer, association, or corporation, is, for the purpose of so conferring jurisdiction, regarded as *personal property at the place where the bond, note or other instrument is, either within or without the state.*"

The surrogate took jurisdiction of the probate and administration here as a matter of duty and not of discretion. Section 144 of the Surrogate's Court Act provides that the surrogate must examine into the making of the will and if it appears that it was duly executed and that the testator was competent, then "it *must* be admitted to probate as a will valid to pass * * * personal property * * *."

Sections 159 *et seq.* contain the provisions of New York law permitting the issuance of ancillary letters, and Section 160 authorizes the New York Surrogates' Court "having jurisdiction of the estate" to issue such letters on proof of original probate in foreign courts, except in the following cases:

> "1. * * * * * *
>
> "2. *Where original letters of administration, upon the estate, have been previously issued to a person entitled to the same*, who is legally competent to act, or the application therefor has not been finally disposed of."

Applying the foregoing statutes to the present case, it appears that by Sections 22 (a) and 23 of the Decedent Estate Law the decedent's will was valid and could be proved in New York irrespective of its validity in Connecticut, because it was executed in accordance with New York law (R. 6, par. 1). Under Section 47 the situs of the decedent's property with which we are here concerned was in New York County, because all his debtors, except

Mrs. Lassner, lived in that county, and his bonds and stocks were there. Under Section 45 the Surrogates' Court of that county acquired exclusive jurisdiction over the estate. Under Section 42 this jurisdiction was *in rem*. Under Section 40 it extended from proof of the will, over all the acts of the administration of the estate to the accounting by the executors and the trustees. The jurisdictional facts existing under Section 144, the Surrogate was required to probate the will in New York County. The language quoted from Section 160 shows that the *proceeding here was original, and not in any sense ancillary.*

It is well settled by New York law that such jurisdiction as is conferred on the New York Surrogates' Court by these statutes is original and plenary, and that the New York court need not and will not surrender any part of its jurisdiction to a foreign court, even though such court be that of the state where the decedent was domiciled, nor will it in such a case as this order the transmission of any part of the property to that state, or recognize the authority of executors or administrators appointed by such a court, or the authority of the court itself, or the application or limitations of the laws of that state, except as (in some measure) those regulating distribution are applied by express statutory enactment.

Matter of Bliss, 121 Misc. 773.
Matter of McCullough, 129 Misc. 113.
Colorado v. *Harbeck,* 232 N. Y. 71.
Matter of Connell, 221 N. Y. 190.
Matter of Hughes, 95 N. Y. 55, 60.
Despard v. *Churchill,* 53 N. Y. 192.
Parsons v. *Lyman,* 20 N. Y. 103.
Matter of Rubens, 128 App. Div. 626, aff'd on opinion below, 195 N. Y. 527.
Higgins v. *Eaton,* 202 Fed. 75, reversing 188 Fed. 938, cert. denied 229 U. S. 622, and see related

case, sub nom. *Matter of Eaton*, 159 App. Div. 7.

Matter of Delaplaine, 45 Hun 225.

Coley's Estate, 14 Abb. Pr. 461, 465.

Booth v. *Timoney*, 3 Dem. 416.

Duffy v. *Smith*, 1 Dem. 202.

Jessup-Redfield, Surrogate's Practice, 6th Ed., 82 and 93.

Fowler's Decedent Estate Law, 207.

Although all of the decisions cited are important for their support of these rules, particular attention may be called to the following:

Matter of Bliss, supra, involved a case strikingly similar to the present one. The opinion was rendered by Mr. Surrogate Foley, a jurist whose learning and ability entitle his opinion to the greatest weight.

The decedent was domiciled in Vermont, but the largest part of his estate was located in New York. Two independent probate proceedings were conducted, one in each state. When the executors came to account in New York, the State of Vermont filed objections on the ground that that state imposed an inheritance tax on certain beneficiaries, that so far as the legacies in this case consisted of personalty, wherever situated, they were subject to that tax, and that the assets should be transferred from New York to the Vermont court, or in the alternative, payment of the Vermont taxes should be directed. The surrogate dismissed the objections of Vermont. Under *Colorado* v. *Harbeck*, 232 N. Y. 71, the State of New York will not enforce the Vermont tax. Where the state of domicile can tax the transfer of foreign property, it must obtain payment out of the property within its boundaries. The surrogate will not, in the exercise of his discretion, transmit the assets from New York to the domicile. "*The adminis-*

tration here is not ancillary but original. Complete jurisdiction to probate the will and to direct distribution is vested in our courts." The transmission of assets to the domiciliary state is a matter of judicial discretion and "should not, however, be decreed unless the rights of creditors or beneficiaries will be served."

> "What I am asked to do is to quiet all question of the power of Vermont to levy a tax by giving it jurisdiction of the property. If the New York assets remain here it is doubtful whether the tax could be lawfully collected. If they could be brought within the taxing jurisdiction of Vermont and actually within her state limits, the tax must be levied under her law. The far-reaching consequence of the approval of such action must be apparent even to those unfamiliar with the intricacies of transfer tax litigation. Such procedure far exceeds any question of comity and would create a system whereby each state would become the busy collection agent of another state in gathering its taxes. The property might be directed to be transferred from state to state and depleted to the vanishing point by successive taxation. No good reason exists so far as the administration of this estate is concerned for the transfer of the assets to Vermont. The executors do not reside in that state; none of the legatees or beneficiaries demand that the assets be transferred; they acquiesce in the contention of the executors that they remain here. No question of marshalling of assets or debts exists. Vermont appears to be now amply secured for any tax due. One of the legatees, the Little Mothers Aid Association, a New York charitable corporation, is entitled under the will to a legacy of $350,000 for the erection of a home. *The granting of the relief sought by the tax commissioner of Vermont will prejudice a charitable corporation, which should be the special object of protection by our courts,* for the provisions of the will require prompt compliance by this legatee with certain con-

ditions, particularly the completion of the home within five years after testatrix's death. If the funds required to pay this legacy be administered through the Vermont Probate Court, delay will result in payment and possible forfeiture of the legacy may take place."

Matter of McCullough, the latest decision in point of time, is also by Surrogate Foley and the opinion contains a review of many of the decisions of the higher courts. The case was one where a resident of Colorado died, leaving personal property in New York County consisting of stocks, bonds and a bank account. Letters of administration were duly issued to the widow under Colorado law. Then there was offered for probate in the New York court a will executed in accordance with New York law. The questions were whether the surrogate's court should continue jurisdiction of the proceeding for the independent probate of the will or should transmit the will to the domiciliary probate court in Colorado, or whether ancillary letters of administration should be issued by the New York court on the decree of the Colorado court to the nominee of the Colorado administratrix.

The surrogate held that under New York law his court had jurisdiction of the proceeding "and that neither as a matter of right nor discretion should the will be transmitted to Colorado," referring to Section 23 of the Decedent Estate Law, quoted above, and that it is the surrogate's duty to proceed with the probate of a non-resident's will in such a case without awaiting action by the domiciliary state.

Colorado v. *Harbeck* is most important as a decision of the highest court of New York, showing the extent to which New York carries these principles in relation to taxation. There, the estate of a resident of Colorado was administered and distributed under New York law, with

no notice to the State of Colorado. Thereafter, under Colorado law, a proceeding was instituted in that state and a transfer tax assessed. The tax having been duly fixed in accordance with Colorado law, suit was brought in New York to collect it out of the property in New York. The New York court refused to aid in the collection of the tax. It pointed out the very obvious fact that the enforcement of tax laws rests on "force and authority," that Colorado had no control of the property or its owners (which is equally true in the present case), that the probate and transfer took place wholly under New York law without any aid from Colorado, and his right to make a will did not rest on Colorado law, nor was the Colorado law the source of the legatee's title. The court dismissed Colorado's argument based on the fiction *mobilia sequuntur personam* and said that the assets of the estate were not at the same time in New York and outside.

Parsons v. *Lyman* and *Duffy* v. *Smith* both involved conflicts with Connecticut administration. In the first case the assets were sent to Connecticut because of special circumstances appealing to the court's discretion, while in the second case transmission to Connecticut was refused. The *Parsons* opinion shows how even at a time when *mobilia sequuntur personam* was accorded universal respect it was only a rule of comity, subject to such exceptions as the state chose to make, and had nothing to do with the actual administration and transfer of the property.

In the *Connell* case, and in the various *Eaton* proceedings, which are well summarized in the opinion of the Appellate Division cited, the nature of the proceedings as proceedings *in rem*, binding non-resident parties through control of the property, is emphasized, and in the *Eaton* cases the power of New York to control the administra-

tion as to New York property, despite inconsistent action in the state of domicile, is again declared. In the *Rubens* case a will validly executed by New York law was upheld, although its execution was insufficient under the law of domicile.

Jessup states the rule to be that "A New York Surrogate has jurisdiction and may proceed with the probate of a non-resident's will of personal property executed according to the laws of such testator's residence without awaiting action by the corresponding tribunals of the other state or country" (p. 82). Later he says:

> "But, on the other hand, once a New York Surrogates' Court has rightly assumed jurisdiction, no action of foreign courts can disturb it or divest it of the control it has acquired over executors or administrators it may have appointed, or prevent it from compelling them to account for the assets they are administering. *Duffy* v. *Smith,* 1 Dem. 202-208. Nor even will this jurisdiction, once assumed, be disturbed by proof of the fact that the personal property which came into the county after decedent's death on the strength of which jurisdiction was exercised was brought in irregularly and without authority of law" (p. 93).

(b) THE PROPERTY LOCATED WITHIN THE STATE OF NEW YORK WHICH THE NEW YORK SURROGATE'S COURT WILL ADMINISTER INCLUDES ALL OF THE INTANGIBLE PROPERTY, A TAX ON THE SUCCESSION TO WHICH IS INVOLVED IN THESE APPEALS.

The Surrogates' Court of New York County will administer all of the items of property involved in these appeals. There is a wealth of authority on the kind of property so located within the State of New York that the courts of that state will take jurisdiction to adminis-

ter it. We confine ourselves here to the citation of the more important cases establishing the fact that the particular property with which we are concerned is in New York and will be administered in New York.

These cases are of two classes: (1) Where the direct question was asked whether New York had jurisdiction of a certain kind of property for the purposes of administration, and (2) where the question was asked whether, under the particular tax statute then in effect, New York could levy a tax on the transfer of property of that kind. Of course, New York's right to levy a transfer tax on the property depended on its jurisdiction of the transfer of that property, and, whether the particular opinion discussed jurisdiction of the property in so many words or not, necessarily the assertion of such jurisdiction is implicit in any decision that New York had authority to levy a transfer tax in the case.

PARTNERSHIP INTEREST:

Matter of Henry, 237 N. Y. 204.
Matter of DuBois, 99 Misc. 219.
Matter of Reimers, 107 Misc. 322.

BANK ACCOUNT:

Matter of Romaine, 127 N. Y. 80.
Matter of Houdayer, 150 N. Y. 37.
Matter of Blackstone, 171 N. Y. 682, 188 U. S. 187.
Matter of Daly, 100 App. Div. 373.
Townsend v. *Pell,* 3 Dem. 367.
Matter of Burr, 16 Misc. 89.

INSURANCE POLICY:

Matter of Miller, 5 Dem. 381.
Johnston v. *Smith,* 25 Hun 171, 176.

And compare reasoning in

Matter of Gordon, 186 N. Y. 471.
Matter of Gibbs, 60 Misc. 645.

CORPORATE STOCK:

Parsons v. *Lyman*, 20 N. Y. 103.
Matter of Romaine, *supra*.
Matter of Bronson, 150 N. Y. 1.
Matter of Whiting, 150 N. Y. 27.
Matter of Palmer, 183 N. Y. 238.
Matter of Cooley, 186 N. Y. 220.
Matter of Lake, 112 Misc. 681.

BONDS:

Beers v. *Shannon*, 73 N. Y. 292, 298.
Matter of Romaine, *supra*.
Matter of Whiting, *supra*.
Matter of Morgan, 150 N. Y. 35.
Matter of Gibbs, *supra*.

CASH:

Matter of Houdayer, *supra*.
Matter of Burr, *supra*.

(c) THE SURROGATES' COURT FOR NEW YORK COUNTY HAS TAKEN AND WILL RETAIN ORIGINAL JURISDICTION FOR THE PROBATE OF THE DECEDENT'S WILL IN THIS CASE AND THE ADMINISTRATION OF ALL OF THE DECEDENT'S PROPERTY, A TAX ON THE TRANSFER OF WHICH IS INVOLVED IN THESE APPEALS, AND THE EXECUTORS HAVE PROCEEDED WITH THE ADMINISTRATION OF ALL THESE ASSETS SOLELY UNDER THE JURISDICTION AND AUTHORITY OF THE STATE OF NEW YORK.

Up to this point we have dealt with the general question of jurisdiction and practice in New York in relation to

non-resident estates and to intangible property of the nature of that involved in this case, and we think that the conclusion has necessarily followed that the transfer of all this property belonging to the decedent will be accomplished under New York law without invoking any aid from or permitting any interference from the statutes or the courts of Connecticut.

If anything is needed to support the conclusions which we have drawn, it is furnished by the actual proceedings had in the present case and the actual administration of all the property with which we are concerned in the present case. Substantially the decedent's entire estate—everything except the real property and the tangible personal property located in Stamford and perhaps the Lassner account receivable and the stock and bonds issued by Connecticut corporations—has been or is being administered by the courts of New York independent of the laws or the courts of Connecticut.

We showed in our statement of facts that the decedent died on September 23, 1924, leaving a will and two codicils, executed in accordance with the laws both of New York and Connecticut. We showed further that none of the executors were residents of Connecticut, but on the contrary, four resided in New York and one in New Jersey and that all of the trustees under all of the trusts were either individuals resident in New York or corporations organized under its laws. It appeared further that of the various gifts made by the will and codicils only the real estate and tangible personal property and $20,000 in cash were given outright to residents of Connecticut; that trusts of the total value of approximately $320,000 were created in which residents of Connecticut were the beneficiaries, but all the trustees were residents in New York; and that all the rest of the gifts, either outright or in trust, including the entire residuary estate, went to non-residents of Connecticut (*supra*, pp. 7-8).

The steps taken under New York statutes and in the New York courts are of sufficient importance so that we feel justified in stating them in some detail.

Original probate was secured in New York. Three weeks after the decedent's death his will and codicils were offered for probate to the Surrogates' Court of the County of New York (R. 15). The petition for probate was presented by two of the executors living in New York City and showed that the decedent was a non-resident of the state, that he left personal property exceeding $10,000 in value in the County and State of New York and contained certain formal recitals, and closed with a prayer that a citation be issued to the persons named, that an order be entered directing service of that citation personally without the state or by publication on such persons as were non-residents of New York or whose names or residences were unknown, that the will be admitted to probate as a will of real and personal property and that letters testamentary issue to the executors (R. 27-30, Exh. E).

Acting under this petition, a citation was issued in accordance with New York practice and was duly served (R. 15).

On the return of the citation *the surrogate entered a decree on November 28, 1924, admitting the will and codicils to probate* (R. 15). From the order so entered it appears that the surrogate had appointed a special guardian in the proceeding and had heard proofs, and thereupon he ordered and adjudged that "the instruments offered for probate herein be and the same hereby are *admitted to probate as the Last Will and Testament of the said deceased, valid to pass real and personal property, and that letters testamentary be issued thereon to the executors who may qualify thereunder*" (R. 30, Exh. F).

Thereupon, on the same day, November 28, 1924, letters testamentary were issued to the five executors who are the

respondents in No. 190 and the plaintiffs-in-error in No. 191 (R. 15). Those letters recited that the will had been proved before and allowed by a New York surrogate, that the decedent was a resident of Connecticut, that he left property in New York County *"by means whereof the proving and registering of said will and the granting administration of all and singular the goods, chattels and credits of the said testator and also the auditing, allowing and final discharging the account thereof doth belong unto us"* and thereupon *"the administration of all and singular goods, chattels and credits of the said deceased in any way concerning his will" is granted to the five executors* (R. 31, Exh. G).

Thereafter, in accordance with the New York practice, the executors applied for an order to publish notice to creditors to present claims and the surrogate of New York County granted such an order on December 8, 1924, and such notice was duly published (R. 15).

One of the three trustees named in certain paragraphs of the will having died before the testator, Abraham L. Gutman qualified as a trustee under the provisions of the will, and his designation as a trustee and his oath of qualification were both filed in the Surrogates' Court of New York County. Similarly, the trustees of the residuary bequest all filed their oaths of qualification in the same court (R. 15).

All of these steps were taken in New York County before any action whatsoever was taken in any court of the State of Connecticut.

The decedent owned real estate and tangible personalty in that state. Of course, Connecticut had jurisdiction to tax the succession to this property, which was all left to a resident of Connecticut. The tax was to be paid out of the capital of the estate and not charged against the beneficiary (R. 14, par. Eighteenth of Will). Probate in

Connecticut seemed advisable. In the first place, it seems that under Connecticut law title to the real estate would not have been clearly vested in Mrs. Lassner until the will had been probated there.

Ferriday v. *Grosvenor,* 86 Conn. at 707.

In the second place, under Section 13 of the Connecticut tax statute (Ch. 190, Public Acts of 1923), the tax would have been a lien on the property until paid, and it seems that the tax commissioner could have instituted probate proceedings himself solely for the purpose of having the tax determined.

Accordingly, the executors sought probate of the will and letters of administration in Connecticut. They proceeded under Section 4956 of the Connecticut statutes, which provides that where a will conveying property situated in Connecticut *has been proved outside the state,* the executor may present authenticated and exemplified copies of the will and the proceedings establishing it, and on due proof the copies are to be filed with the same effect on the property as if the will had been originally proved in Connecticut. No distinction is made whether the will is one of a resident or a non-resident of Connecticut, except that a resident's will made in Connecticut cannot be proved unless executed according to Connecticut law. "All property so passing shall be subject to the provisions of all laws of this state relating to inheritances and successions and taxation thereof."

Connecticut probate was not sought until January 8, 1925, when the executors exhibited to the court in Stamford a duly authenticated and exemplified copy of the will and of the codicils and of the record of the proceedings establishing them in the New York Surrogates' Court (R. 18, par. 19; 38, Exh. J). Thereupon, reciting these facts, on January 15, 1925, the probate court in Stamford granted

letters testamentary to the executors (R. 18; 40, Exh. K). Then under Connecticut procedure the Stamford court made an order limiting the time for the presentation of creditors' claims and directing that an inventory of the estate be filed and appointing appraisers (R. 19). The inventory and appraisal were filed (R. 19) and on September 1, 1925, the executors filed a statement of the property in the estate for the purpose of having the succession tax due Connecticut determined (R. 20, par. 23). As shown in the preliminary statement, the tax commissioner determined that all of the property belonging to the decedent was taxable and was upheld by the various Connecticut courts to which appeal was taken.

It is to be noted that in all these proceedings the executors took only the steps which they would have taken had the decedent been a non-resident of Connecticut. It was necessary to probate the will and take these steps in Connecticut but only so far as realty and tangible personal property there were involved. Over these items of property Connecticut properly asserted jurisdiction. (Perhaps Connecticut could have prevented the transfer of the Lassner account receivable and the Connecticut stock and bonds, too, but whether it could or not seems immaterial, since we do not protest the tax on them.)

If it be argued that by so probating the will in Connecticut the executors submitted to a jurisdiction which that state otherwise could not have asserted, we shall show subsequently that this is not the law (*infra*, p. 57). It is well established that where a state has certain jurisdiction of parties or property, the submission of the parties to that jurisdiction or the control of the property does not extend the jurisdiction of the state for other purposes.

After the probate in Connecticut was secured the executors continued with the administration and distribution of the entire estate, excepting only the realty and tangible

personalty, under the authority granted them by the New York court and under the supervision and control of that court.

Money was due the estate on the life insurance policy issued by the Mutual Life Insurance Company of New York. This was collected by exhibiting to the company copies of the letters testamentary from the New York court together with proof of claim and certificate of death (R. 16, par. 16). The savings account was collected from the National City Bank of New York on the same papers (R. 16, par. 16). The certificates of stock owned by the decedent (R. 25, Exh. B), valued in excess of $277,777, representing shares of stock in fifteen different corporations and all standing in the decedent's name at the time of his death and unendorsed, were transferred by exhibiting to the transfer agents of the different corporations copies of the New York letters testamentary together with tax waivers from the proper state officials. So far as these waivers were concerned, it was necessary to secure a Connecticut waiver only as to the three shares of Connecticut stock, and as to all the transfers, it was necessary only to show the authority of the executors from the New York court (R. 16, par. 16).

The executors opened a bank account in the Central Union Trust Company, New York City, through which they have handled moneys coming to them by virtue of their position. They have never had a bank account in Connecticut or anywhere outside New York (R. 15-16, par. 16). Out of this bank account they have paid all of the legacies provided for in paragraphs Eighth, Eleventh and Thirteenth of the will and in the first and second codicils, have paid the decedent's debts and the Federal estate and New York transfer taxes, and have paid over to the trustees named in the Third, Sixth, Seventh, Ninth, Tenth and Twelfth paragraphs of the will

and third paragraph of the second codicil the capital of the trust funds established, the total amount of such payments made by them up to the time the stipulation of facts was signed on February 26, 1926, being $762,325.68 (R. 16, par. 16). Administration has, of course, been continued in New York, and the executors have since paid over to the residuary trust an additional sum exceeding $780,000.

Meanwhile, no additional steps whatever have been taken in Connecticut either as to distribution or accounting, nor is it proposed to take such steps until it becomes necessary to account for the few items of property, the administration of which we have conceded to be within the proper jurisdiction of Connecticut.

(d) THE LAW AND THE COURTS OF THE STATE OF CONNECTICUT DO NOT AID AND CANNOT INTERFERE WITH THE TRANSFER OF OR SUCCESSION TO THE PROPERTY INVOLVED IN THESE APPEALS.

Up to this point we have shown affirmatively how New York administers and controls the transfer of the property of a non-resident, such as that involved in these appeals, to the exclusion of the state of domicile. We now propose to examine the reverse side of the shield and see how powerless Connecticut is. We shall then show that the law and the policy of other states is substantially like that of New York.

It is essential to recognize the distinction which we have already suggested between the law of administration and the law of distribution. So far as we know, it is the universal rule that so far as the actual administration of property within the territory of a state is concerned, that state applies its own law and makes no reference whatever to the law of the owner's domicile. That is not to say, of course, that a state may not permit payment over to an

executor or an administrator at the domicile. Such a course is purely a matter of state policy, universally subject to the right of resident claimants against the non-resident estate to interfere for their own protection, and subject now in the very great majority of states to the insistence of the state that before this be done, a transfer tax shall first be paid to it or else the person permitting the transfer shall be liable therefor. Of course, when we speak of the law of administration, we mean the law prescribing the steps by which title to and the ownership of property may be transferred out of the decedent into the ultimate recipient, and this, after all, is the actual transfer.

Contrasted to this, the law of distribution is that law which determines to what person the decedent's property shall pass. For the answer to this question, the majority of our states refer to the law of the decedent's domicile. They refer to the law of the domicile not because it has any force or effect of its own within their own territory, but because as a matter of practical convenience and comity it is advisable that all of a man's property should be distributed under a common set of rules. Such reference to the law of domicile is always subject to whatever exceptions the state controlling the property may choose to make. Such exceptions probably exist in every state, ranging from simple protection of resident creditors to the situation which exists in Mississippi and Illinois, where the law of the domicile is disregarded entirely and the rules of distribution of those two states are applied to all non-resident property within their borders.

Hemingway's Code (Miss.), 1927, Sec. 1447.
Smith's Ill. Rev. Stat., Chap. 39, Sec. 1 (1921).

Cases supporting these distinctions are cited *supra*, page 36, and *infra*, page 58.

Now, of course, so far as the justification for the transfer tax by the state of domicile on all of a resident decedent's personal property rests on the theory that the law of the domicile is essential to the accomplishment of the transfer, it is based on this fact that the state having actual control of the property usually refers to the law of the domicile to determine the distribution of the property. It would seem that the *Frick* decision has disposed as a matter of law of this traditional argument. That decision has pointed out the fallacy of the theory and shown that in fact the law of the domicile has no effect except by virtue of its adoption by the state where administration is had, and then the force of the domiciliary law results, not from its own power, but from the law of the state of administration adopting it.

See discussion, 24 *Mich. Law Rev.* 50, 52-53.

So far as this principle of the *Frick* decision is concerned, there can be no distinction between tangible and intangible property. Whether there can be a distinction so far as the *situs* of tangibles and intangibles is concerned, we shall argue separately—though how that can be material we do not see, when the thing taxed is the transfer, and the transfer takes place in New York, by New York law. Certainly, so far as the application of New York or Connecticut law is concerned in the New York administration, the situation is identical, no matter to which class the particular property belongs. Whether the decedent's entire estate in New York consisted of horses, cattle and furniture, or whether it consisted of debts due from and causes of action against New York residents, the New York law of administration and its reference to Connecticut law is identical. The New York law just as much governs the disposition of intangibles as of tangibles so far as the legislature adopts

rules in conflict with Connecticut law, and so far as Connecticut rules are applied in New York to the disposition of intangibles administered here, it is just as much dependent for its force on New York's adoption as if tangibles were involved.

Taking the present case, it is quite clear that the law of Connecticut in and of itself has conferred nothing on this estate. Under some circumstances New York might refer to Connecticut law to determine where the property should go, but in fact in this case it will not do so, and if it did so it would be purely as a matter of policy, subject to any number of limitations and with no power in the State of Connecticut to assure its resident decedent or his representatives that the Connecticut law could benefit them. This appears clearly from an analysis of New York statutory and case law.

So far as Connecticut law is invoked to test the decedent's will, it is only by virtue of the provisions of Section 47 of the Decedent Estate Law of the State of New York. Speaking of property other than real estate, that law declares "the validity and effect of a testamentary disposition of any other property situated within the state * * * are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death." So the laws of other states become a rule of decision in New York, but obviously they have no force of their own within this state.

This is the more evident when the limitations on the adoption of foreign law are considered. Section 47 contains two such qualifications. Just before the language quoted above we find "*except where special provision is otherwise made by law.*" Following the provision quoted above is another sentence: "Whenever a decedent, being a citizen of the United States or a citizen or a subject of a foreign country, *wherever resident, shall have declared*

in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws." A testator, by a simple clause in his will, can avoid any reference whatever to the law of his domicile.

"Special provision is otherwise made by law" in a number of cases. We have already referred to Sections 22 (a) and 23 of the Decedent Estate Law. Section 22 (a) provides that a will executed outside the state in accordance with the law "either of the place *where executed* or of the testator's domicile" is valid. In other words, had the decedent in this case executed his will in New Jersey according to New Jersey law, it would have been recognized in New York even if it was improperly executed under Connecticut law. By Section 23 a will "executed as prescribed *by the laws of the state*" or as prescribed by the law "either of the place where executed or of the testator's domicile" may be admitted to probate in New York. In other words, in this particular case, the will, having been executed in New York (R. 6), was entitled to probate here even if it had not been executed according to Connecticut law. Both these sections are subject to the further provisions that though the will is valid where executed, it must still be "in writing and subscribed by the testator" to be recognized in New York.

Section 130 permits an executor or administrator appointed in any state in the Union or in any foreign country where the decedent has left surviving a husband, wife or next of kin to maintain an action in New York to recover damages for wrongful death of the decedent subject to certain prescribed limitations. Section 133, however, prescribes how the damages recovered are to be divided among the decedent's successors under the supervision of the surrogate's court. This direction must be

followed, although the law of the domicile might prescribe a totally different division.

On turning to the Surrogate's Court Act, we find similar proof that the law of domicile is effective here only by virtue of express adoption and then subject to such limitations as our legislature chooses to make.

Even where original jurisdiction of an estate is secured by a court other than that of New York, it depends for effective enforcement of control over property within New York upon the permission of the New York Legislature. Sections 159 and 160 of the Surrogate's Court Act relate to ancillary letters. Section 159 directs the issuance of ancillary letters upon proof of the proper issuance of original letters in the foreign court by "the Surrogate's Court *having jurisdiction of the estate.*" Section 160 is the equivalent provision for administration of an intestate foreign estate, the ancillary letters of administration to be issued by the surrogate's court "*having jurisdiction of the estate.*"

By Section 165, however, this permission for ancillary administration is subject to the rule that before any assets are transmitted out of the state the surrogate's court having jurisdiction may direct the ancillary representative "to pay out of the money or the avails of the property *received by him under the ancillary letters and with which he is chargeable upon his accounting the debts of the decedent due to creditors residing within the state.*"

It is unnecessary, we think, to elaborate comment upon these provisions of New York law to which we have referred. They are illustrative of the general policy of the law and of the plenary control which New York asserts over property within its jurisdiction, though the estate to which it belongs is that of a non-resident.

We offer these references to the New York law simply as confirming the obvious soundness of the ruling in the *Frick* case. We believe that that case settled the law.

Of course the fact that the executors appeared in the probate court in Stamford confers no jurisdiction on Connecticut over the estate which it would not otherwise have possessed. We showed why it was necessary for the executors to go into the Connecticut court for the purpose of securing administration of the tangible personal property situated in Connecticut and of giving clear title to the real estate which the decedent owned in Stamford, and that Connecticut had jurisdiction to levy a tax on the succession to this tangible property and real estate (*supra*, p. 46).

Now, had the executors chosen not to appear in Connecticut, and had they permitted the State of Connecticut to conduct a proceeding instituted by its tax commissioner, that state would undoubtedly have assessed a succession tax against the entire estate of the decedent so far as it could discover the amount. But when it came to collect that tax, it would necessarily have been limited to collecting something less than the $50,000 represented by the real estate, the tangible personalty and the Lassner account receivable and three shares of Stamford Theatre stock. That was the only property over which it had sufficient power to levy for the purpose of collecting its taxes.

The State of New York would have extended no aid or assistance to Connecticut to collect the tax from property in New York.

> *Colorado v. Harbeck, supra*, p. 36.
> *Matter of Bliss, supra*, p. 36.

Although the executors appeared in the Connecticut court, it is quite evident that the Connecticut courts must recognize the decrees and judgments of the New York Surrogates' Court in the administration and distribution of this estate so far as they relate to any part of the property involved in these appeals. They must do this whether

the rules applied by the New York court are in accordance with Connecticut rules or not, and even if the New York court purported to reach its conclusions in accordance with Connecticut law and misinterpreted that law. To do otherwise would be a denial of full faith and credit in violation of the Federal Constitution (see Point IV, *infra*, p. 118).

But entirely aside from this, it is well settled that where general jurisdiction has been properly secured over parties for a particular purpose, there is not thereby conferred on the court or on the state in which the court is situated jurisdiction over those parties for purposes which would have otherwise been beyond their jurisdiction.

Parsons v. *Lyman*, 20 N. Y. 103, 116-117.
Bliss v. *Bliss*, 221 Mass. 201, 205.
Dewey v. *Des Moines*, 173 U. S. 193.
Terral v. *Burke Construction Co.*, 257 U. S. 529.
Palmetto Ins. Co. v. *Conn.*, 272 U. S. 295.
City of New York v. *McLean*, 170 N. Y. 374.

The State of Connecticut could properly control the executors so far as the administration of the real estate, tangible personalty, Lassner account receivable and the Stamford Theatre stock was concerned. Having secured jurisdiction for this purpose, they cannot go further and assert jurisdiction over other property which is in fact subject to the jurisdiction of the State of New York and is actually under administration by the courts of that state.

(c) THE GENERAL RULE OF LAW AND THE USUAL POLICY THROUGHOUT THE UNITED STATES IS IN ACCORDANCE WITH THE RULE AND POLICY OF NEW YORK.

The New York rule that, so far as administration of property within the state is concerned, the laws of that

state alone apply; that so far as distribution is concerned, the laws of the domicile are referred to only as a matter of comity, to the extent permitted by the first state and subject to whatever limitations it chooses to make; and that the state of domicile can do nothing to make its laws or the rights given under them effective, is the general law throughout the United States. The statement in many decisions that the law of the domicile must govern the distribution and must be respected by the state having actual jurisdiction of the property is inaccurate. It is a generalization which is disregarded in practice by the very courts which make it. Usually the statement will be found either to be pure dictum or to have been announced by the courts of the state of domicile as an excuse for levying a tax upon the transfer where the actual administration took place in the courts of another state. There are, to be sure, two exceptional classes of decisions, the first those where the courts find that the legislatures have not chosen to exercise their powers—questions of interpretation and not of power—and the second, a few cases where courts have denied the existence of the power itself. The first class, of course, are distinguishable, and the second are contrary to the general line of authority in the United States.

The following cases show that the state having actual control over the property has the power to administer and distribute it as it sees fit either to the partial or total exclusion of the state of domicile and its law.

Iowa v. *Slimmer*, 248 U. S. 115.
Baker v. *Baker, Eccles & Co.*, 242 U. S. 394.
Wheeler v. *New York*, 233 U. S. 434.
Chicago, Rock Island & Pac. R. R. v. *Sturm*, 174 U. S. 710.
Blackstone v. *Miller*, 188 U. S. 189.
Eidman v. *Martinez*, 184 U. S. 578.

Warrior C. & C. Co. v. *Nat'l Bank,* (Ala.) 53 So. 997.
McDougald v. *Lilienthal,* 174 Cal. 698.
Adams v. *Phelps,* 16 Conn. 127.
Neal v. *Boykin,* 132 Ga. 400.
Vinton v. *Sargent,* 195 Mass. 133.
Bliss v. *Bliss,* 221 Mass. 201.
Ewing v. *Warren,* 144 Miss. 233.
Matter of Swift, 137 N. Y. 77, 86.
In re Clark's Estate, 37 Wash. 671.

See also excellent discussion of principle in

Matter of Swift, 137 N. Y. 77.
Matter of Scott, 129 Misc. 625.
Lorenzen *Extra-territorial Succession Taxes,* 1 Conn. Bar Journ. 154, dealing with the Connecticut decision in this case.

It appears very clearly from these cases that the principles adopted by the New York courts represent the general law throughout the United States and that the policy of the State of New York is followed sometimes in less and sometimes in greater degree by most of the states in the Union and that this policy is commonly supported and effectuated by the courts.

Special note is to be paid to the fact that Connecticut itself follows this rule when the question is a practical one.

Adams v. *Phelps,* 16 Conn. 127.

2. The situs of the property involved in these appeals, for the purpose of determining where its transfer was accomplished, was exclusively in New York.

We revert now to the second of the two theories by which a state of domicile justifies a tax on the transfer

of all of a resident decedent's personal property—the theory that the situs of all his personal property is at his domicile, and hence its transfer must be effected there and that transfer is subject to a tax there.

This theory has several obvious points of attack.

In the first place, this tax is on the succession to the property, not on the property itself. Hence it makes no difference where the property is, except for the purpose of determining where the transfer takes place. But as we have shown, it is clear in this case that the transfer took place in New York, and hence we have no occasion to inquire into the situs of the property to aid us in the determination of that question.

In the second place, whatever the general rule, the law of Connecticut is that the situs of the property is wholly immaterial. The Connecticut court insisted that the theory of the tax was the use of the law of the domicile in accomplishing the succession, and admitted that the property here involved had its situs outside the state and was not subject to its control; and quoted from many earlier decisions based on the same principle and making the same admissions (R. 62-64).

In the third place, in a case where determination of the situs could aid as to determine where the transfer took place, we would be interested in the question of situs only for that one particular purpose. There are different situs for different purposes; we do not care here what would be the situs for attachment, for determining validity of the assignment, or even for general property taxation.

Lastly, the argument that the situs of all intangibles is at the owner's domicile must rest upon the fiction *mobilia sequuntur personam*. But this fiction in its origin, we shall see, applied to tangibles, and indeed it was extended to intangibles only by analogy. So far as it applied to tangibles, it was overturned and discarded

by the decisions of this court in the *Union Refrigerator Transit* and *Frick* cases, both for purposes of general property taxation and transfer taxation. If it can be shown that the fiction, as applied to intangibles generally, or specifically to the transfer of the intangibles involved in these appeals, is false in fact and has ceased to do equity and has become an instrument of inequity, then just as those considerations resulted in the rejection of the fiction for tangibles, they should result in its overthrow as to intangibles. We believe that this falsity in fact and the resulting inequity can be demonstrated so far as the problem of this particular case is concerned. The fact that the transfer of this property was accomplished exclusively in New York, under New York law, by New York courts, as we have shown in the preceding argument, by itself is a most persuasive argument that the property had no situs in Connecticut, for if it had such a situs there, Connecticut surely could control its disposition.

These various considerations we shall develop in the subsequent argument. We think it best to recognize at the very outset that the law of situs is as intricate and confused as any branch of American jurisprudence. Substantially any theory of situs which we advance could be supported by the decisions of courts whose opinions carry weight; substantially any theory so advanced could be refuted by the decisions of courts of equal weight. Frequently the decisions of the same court will be inconsistent and this inconsistency may represent either a gradual change from one theory of situs to another, or it may represent a wavering allegiance to two different theories without recognition of the inconsistency. In this state of the law it is hardly possible to argue intelligently that any one theory definitely is the law and another is definitely wrong. But if we approach the subject by seeking to ascertain first what the law of situs was in its origin and what

conditions dictated the determination of the principles then accepted, and if we then study the gradual development of the law to determine whether and how those principles changed and whether and how they were affected by a change in practical conditions, and if finally we ask what are the conditions now, what ought to be the law of situs now, and how far the courts have gone under the influence of these new conditions in adopting new principles of situs and to what extent their reiteration of inconsistent principles is dictated by respect for precedent and the failure to appreciate the inconsistency, then we shall have gone a long way toward finding a path through the present maze and in determining the ultimate goal.

(a) THE MEANING OF SITUS.

First it is necessary to determine what we mean by the term "situs," and in this connection we shall also have to determine what is meant by "jurisdiction" and the relation of the two terms to each other.

Jurisdiction, and situs, and control, are, we think, inextricably intertwined with each other. In other words, they are different aspects or phases of the same factual situation. Where the property is, that locus controls it and has jurisdiction; where it is controlled, there it is, and jurisdiction exists; if jurisdiction exists, it is because control can be exercised and because the property is there.

If the rules of situs and jurisdiction and their practical application to various kinds of property are analyzed we see clearly on the one hand why situs and physical location are frequently confused and why in truth situs is determined by jurisdiction and that is determined by power of control.

Real estate has a fixed immovable location. Of all species of property it is subject to the easiest control. The jurisdiction exercised over it by the sovereign where

it is located is obvious. The officers of the state can step upon the land and occupy it physically, transfer its possession to whom they will and exclude the owner from it. It cannot escape from them; it cannot be moved. The physical power so to control the property, plus the constitutional right to do so, is jurisdiction, and it so happens that the place where that can be done—the situs of the property—is also its physical location.

The situation with relation to personal property which, nevertheless, is tangible in its character is very much the same. Here, to be sure, the property is capable of removal from a given spot and hence, properly or improperly, it can be transferred from one jurisdiction to another. Nevertheless, when it is at a given place, there can be very little question of the sovereign who has jurisdiction over it. It is the sovereign whose officers physically can control its use, seize it, take possession away from the owner, whose courts can issue decrees which can be made binding by physical force. It was property of this sort which was involved in the *Frick* case and it was because these elements of control existed that the Supreme Court of the United States found that the States of New York and Massachusetts, respectively, and not the State of Pennsylvania, had jurisdiction of the property involved and hence jurisdiction of the transfer.

But the physical location of tangible personalty is not always its situs. It happens occasionally that tangible personal property may be physically located at a given place and yet jurisdiction over it for certain purposes may be lacking. Thus, for example, personal property in transit through a state, there only temporarily, is not within the jurisdiction of the sovereign for the purpose of taxation or administration on the owner's death. On the other hand, the same property is within that jurisdiction for the purpose of seizure on attachment or execution. Accord-

ingly, the property has no situs in that state for tax and administration purposes, but it has a situs there for attachment and execution. This shows on the one hand the identity of situs and jurisdiction and control, and on the other, it shows what we suggested at the beginning of this discussion of situs, that there may exist a situs for one purpose at the one time and not for another purpose or at another time.

Despite these possibilities, however, it is probably true that in ninety-nine cases out of one hundred, control, jurisdiction and situs of tangible property coincide for all purposes with physical location and hence again there is added strength to the assumption so frequently made that situs is equivalent to physical location.

We know of no better expression of these principles than that by Charles E. Carpenter of the University of Illinois in his article on *Jurisdiction Over Debts,* 31 Harvard Law Review 905 (May, 1918). He says in introduction:

> "While physical power is recognized as the foundation of jurisdiction * * * still this fundamental principle has not always been kept clearly in mind and the failure to do so has produced a complex and confused state of the law where simplicity only need exist."
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> * * * * * *
>
> **"Jurisdiction over tangible property is dependent upon the physical presence of the property, for it is at such place that the power of control exists. *But the important thing to observe is, that it is the power of control that is the basis of jurisdiction, and not location, and it is this power of control which gives whatever significance there is to the legal concept, 'situs.'***
>
> **"It is evident that the law for purposes of jurisdiction is not interested in the spatial quality of property, that is, the fact that the property has**

extension, or occupies space, except in so far as that quality affords the state the power of control over it. If the location, or situs, of tangible property gave no power of control, or if control could be exercised independently of situs, then we should never have 'situs' mentioned in connection with jurisdiction over property. Where the property is tangible in form, power of control and location coincide. (*Pennoyer* v. *Neff*, 95 U. S. 714 [1877].)

"Even here it is evident that it is power of control and not location that is the basis of jurisdiction. For the mere fact that the property is within the territory during the litigation is not enough; control must be taken at the time litigation is begun. (*Pennoyer* v. *Neff*, 95 U. S. 714 [1877].)"

Now when we come to intangible property the fact that this property is not suspectible of any physical location (except to the extent that the intangible right may be "clothed" in the form of an instrument) results in confusion so long as the prevailing notion is that situs has some relation to physical location. The confusion which has resulted and the key to the problem is ably described by Carpenter. Continuing in his article, he says:

"Where the property is intangible, however, this element of location is absent, but power of control may still exist and constitute the basis of jurisdiction. The failure to observe that it is this element of control, and not the quality of occupying space, that gives 'situs' its significance, has led to the greatest confusion in the decisions relating to jurisdiction over intangible property in the form of debts. A variety of views, mostly untenable, has developed as a result of the attempt to use 'situs' in the sense of location as applicable to debts. One view locates it, by means of the fiction *mobilia sequuntur personam*, at the creditor's domicil (*State Tax on Foreign-Held Bonds*, 15 Wall. [U. S.] 300 [1872]); another at the debtor's domicil (*Bragg* v. *Gaynor*, 85 Wis. 488, 55 N. W. 919 [1893]); a third,

considering it a light and nimble thing, finds that it may be located by legislative fiat at the debtor's domicil (*Minor, Conflict of Laws,* 287); a fourth considers a debt, since it is intangible, as being without situs (*Beale, Cases on Conflict of Laws,* Vol. III, 507, §25); a fifth, as having its situs determined in each case by the purpose involved (16 Harv. L. Rev. 63, note); a sixth, that it has two situses, an actual one at the domicil of the debtor, and a legal one at the domicil of the creditor (*Minor, Conflict of Laws,* §121); a seventh, that where the debt is in the form of a bond, note or other specialty, its situs is where the instrument is (*Bacon* v. *Hooker,* 177 Mass. 335, 337, 58 N. E. 1078 [1901]); and an eighth, which seems to be the more accurate view, that the situs of a debt is wherever the debtor can be found (*Harris* v. *Balk,* 198 U. S. 215 [1905]).

"*Bearing in mind this elemental fact that physical power is essential to jurisdiction over property and considering situs as the place where power of control can be exercised,* let us, in the light of the jurisdiction that is exercised over tangible property, consider the problems of jurisdiction over debts for the purpose of administration, garnishment, and taxation."

This last suggestion of Carpenter's solves, we think, much of the modern difficulty over determining the situs of intangible property for whatever purpose. Situs is control and jurisdiction is control, and while physical location of tangible property may co-exist with the place of control, it is not the determining element. As a result, the fact that intangibles have no physical location presents no new problem—there still remains to be determined only the question where control of the intangible can exist.

See also excellent discussion,

14 *Cal. Law Rev.* 225, especially 227-228,

and

Beale, *The Situs of Things*, 28 Yale Law Journ. 525.

The suggestion that control is the true test of situs is amply supported by decisions.

Savings Society v. *Multnomah County*, 169 U. S. 421.
Chicago, Rock Island etc. Ry. v. *Sturm*, 174 U. S. 710.
Blackstone v. *Miller*, 188 U. S. 204.
Buck v. *Beach*, 206 U. S. 392, 407.
Wheeler v. *Sohmer*, 233 U. S. 434, 446.
McDougald v. *Lilienthal*, 174 Cal. 698.
Adams v. *Phelps*, 16 Conn. 127, 135.
Wilcox v. *Ellis*, 14 Kan. 588.
Vinton v. *Sargent*, 195 Mass. 133.
Bliss v. *Bliss*, 221 Mass. 201, 204-205.
Welch v. *Treasurer*, 223 Mass. 87.
Hardware & Mfg. Co. v. *Lang & Co.*, 127 Mo. 242.
Matter of Swift, 137 N. Y. 77.
Matter of Houdayer, 150 N. Y. 37.
Matter of Scott, 129 Misc. 625.
Redmond v. *Commissioners*, 87 N. C. 122.

(b) SITUS OF INTANGIBLE PROPERTY FIXED BY THE ELEMENT OF CONTROL AT A POINT OTHER THAN THE OWNER'S DOMICILE IS RECOGNIZED BY THE LAW FOR MANY PURPOSES, INCLUDING THE EXERCISE OF THE POWER OF TAXATION.

Such an actual situs away from the domicile is recognized for many purposes—administration, attachment, execution and taxation of all kinds.

Continuing with his article, Carpenter takes up the existing law as to the situs of intangible property for various purposes.

Taking up first the question of jurisdiction of debts for purposes of administration, he shows that ancillary administration is granted by courts of a state where tangible property is located or where the debtor of a non-resident decedent is domiciled, because actual power of control over the property and the debt give jurisdiction. But if a debtor is a transient in the state, its courts will take no jurisdiction because of the uncertainty of its continuance; *only when the continuance of jurisdiction is reasonably certain will they exercise their power.* "Where the property is permanently located or where the debtor has his domicil, there the court has jurisdiction all the time, and if administration is granted, *the administrator can be practically certain of making use of the powers granted him*" (p. 909).

Taking up next the question of jurisdiction over debts for purposes of garnishment, he establishes here too that the test of jurisdiction for this purpose is the physical location and the control given by that physical location in the case of tangible personalty, and the control of the debtor and the control thereby given over the debt in the case of intangibles. His learned explanation of these principles is so complete that we forbear attempting to summarize it. He urges ably the practical aspects of the question of situs, the importance of changing conditions as modifying the rules of law and the need of emphasizing actuality rather than of adhering to tradition or theory.

It is not difficult to support his views by a reference to the decisions of the courts in this country in many branches of the law.

It is consistently recognized that the proper jurisdiction for the purpose of attaching an intangible right is that

where the debtor is to be found. This is the rule established by the State of Connecticut itself.

Barber v. *Morgan,* 84 Conn. 618.
Veeder Mfg. Co. v. *Marshall,* 79 Conn. 15.

In the *Barber* case a resident of Connecticut attached the property of a non-resident defendant in shares of stock issued by a Connecticut corporation, and the Connecticut court specifically held that the situs of the stock in the corporation was the place where the corporation was located, citing earlier Connecticut cases.

The same rule is applied consistently by the courts of other states.

Chicago, R. I. & P. Ry. Co. v. *Sturm,* 174 U. S. 710.
New Orleans v. *Stempel,* 175 U. S. 309, 321-322.
Jellenik v. *Huron Copper Mining Co.,* 177 U. S. 1.
Yazoo & Miss. Valley R. R. Co. v. *Clarksdale,* 257 U. S. 10.
DeBeam v. *DeBeam,* 115 Md. 668.
Hardware Mfg. Co. v. *Lang & Co.,* 127 Mo. 242.
State ex rel. v. *Leahy,* 193 Mo. App. 36.
Flynn v. *White,* 122 App. Div. 780.
People ex rel. Wynn v. *Grifenhagen,* 167 App. Div. 572.
Gen'l Motors Corp. v. *Ver Linden,* 199 App. Div. 375.
Catlin v. *Hull,* 21 Vt. 152, 160.

See also:

Eidman v. *Martinez,* 184 U. S. 578, 581-582.
Blackstone v. *Miller,* 188 U. S. 189.
26 *Col. Law Rev.* 605, especially 608.

The discussion in the first case cited, *Chicago, R. I. & P. Ry. Co.* v. *Sturm,* is most enlightening, and the court says in summary:

> "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it you must go to the domicile of his debtor and can only do it under the laws and procedure in force there. * * * *Whatever of substance there is must be with the debtor. He, and he only, has something in his hands.*"

The same rule applies as to execution. The basic principle is enunciated in

> *Yazoo & Miss. Ry. Co.* v. *Clarksdale,* 257 U. S. 10.
> *Wait* v. *Kern River Mining Co.,* 157 Cal. 16.
> *Telegraph Co.* v. *Howell,* 162 Mo. App. 100.

Even more significant is the fact that the same principles have been applied and the same decision reached when the question has arisen out of administration of estates.

> *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394.
> *Warrior C. & C. Co.* v. *National Bank,* 53 So. (Ala.) 997.
> *Adams* v. *Phelps,* 16 Conn. 127.
> *Neal* v. *Boykin,* 132 Ga. 400.
> *Commonwealth* v. *Peebles,* 134 Ky. 121.
> *Vinton* v. *Sargent,* 195 Mass. 133.
> *Gray* v. *Lenox,* 215 Mass. 598.
> *Gregory* v. *Lansing,* 115 Minn. 73.
> *Ewing* v. *Warren,* 144 Miss. 233.
> *Re Ewing,* 6 Prob. Div. 19.

In all these cases it will be observed that jurisdiction over the property existed because the sovereign had the

power of control over it irrespective of the owner's domicile and that the situs of the property for the particular purpose involved was where that power of control could be exercised.

Further, an analysis of these cases shows that in the very great majority there was not at the time that jurisdiction was asserted by the sovereign involved concurrent power of control and jurisdiction in the sovereign of domicile. Where, for example, a debtor was found in a foreign state and served with process of attachment, it is quite obvious that he could not at that time have been subjected to service either at his own domicile or at the domicile of the creditor against whose claim the attachment ran. So as to execution cases. The question was even more pertinent in the administration cases and, of course, here we come into the very field which we discussed in the first part of this point. Those cases all give intangible rights a situs for purposes of administration at some point other than the decedent's domicile, and where there was involved assertion of jurisdiction both on the part of the state of domicile and another state, it was held that the latter, exercising the actual power to control the disposition of the property, had exclusive jurisdiction. Yet it must be obvious that if the situs of that property had been at the decedent's domicile it could have been controlled there.

When we turn now to the field of taxation we find it equally well settled that intangibles have a situs for tax purposes away from the owner's domicile. Many of these cases which we cite here go beyond this point and announce principles and rules which we believe unsound—they may recognize concurrent jurisdiction to tax by the sovereign

of domicile or may announce limitations on situs away from domicile which are not in accordance with the modern law. These other questions we shall discuss separately. We are concerned here only with the principle that such jurisdiction and control exist away from the domicile, that the intangibles have a situs away from it for tax purposes and the power of taxation can be effectively asserted. These cases include both property and transfer tax cases.

Supporting this statement are the following cases:

Bristol v. *Washington County,* 177 U. S. 133.
Blackstone v. *Miller,* 188 U. S. 189.
Selliger v. *Kentucky,* 213 U. S. 200.
Rogers v. *Hennepin County,* 240 U. S. 184.
McDougald v. *Lilienthal,* 174 Cal. 698.
Blain v. *Inby,* 25 Kan. 499.
Commonwealth v. *B. F. Avery & Sons,* 163 Ky. 828.
Welch v. *Treasurer,* 223 Mass. 87.
Matter of Jefferson, 35 Minn. 215, 218.
Johnson v. *Harrison Nav. Stores Co.,* 108 Miss. 627.
Finch v. *York Co.,* 19 Neb. 50.
Berry v. *Windham,* 59 N. H. 288.
Hoyt v. *Commissioners,* 23 N. Y. 224.
Redmond v. *Commissioners,* 87 N. C. 122.
Billinghurst v. *Spink County et al.,* 5 S. D. 84.
Robinson v. *Dover,* 59 Utah 521.
Catlin v. *Hull,* 21 Vt. 152.
Laidlay v. *Lord Advocate,* 1890 A. C. 468.
And see also cases *infra,* pp 88-89, 94.

It is evident from this citation of authority—and it could easily be multiplied tenfold—that intangible person-

alty is commonly given a situs both for general and transfer tax purposes away from the domicile of the owner.

Connecticut itself follows this course by express statute. Section 20 of the statute here involved, Chapter 190 of the Laws of 1923, provides in part:

> "The following property owned by a nonresident of this state at the time of his decease which shall pass by will or inheritance under the laws of any state or country, shall be subject to a transfer tax of two per centum of its fair market value upon the death of such owner: All tangible personal property, including moneys on deposit within this state; all stocks or obligations of any national bank located in this state or of any corporation organized or existing under the laws of this state; and any obligation of any resident of this state * * *."

(c) THE SITUS OF THE PROPERTY IN CONNECTICUT DEPENDS ON THE MAXIM *mobilia sequuntur personam*. THE HISTORY AND PURPOSE OF THIS FICTION AND ITS PLACE IN THE LAW.

We have now to inquire why there should be concurrent situs and jurisdiction for the purpose of taxation at the owner's domicile. What can be urged in support of such double taxation of intangibles? There certainly is an actual situs and an actual jurisdiction for taxation away from the domicile. Has the assertion that there is also a situs and jurisdiction at the domicile an actual basis of fact, too, or if it is a fiction, has it any equitable basis for surviving when the fact is recognized, too, or does it rest merely on the arbitrary declaration of the courts that that is the law?

It is to answer this question that we propose to examine as briefly as we can the origin of the fiction, its place in the law and the growth of the law of taxation.

The theory that the legal situs of a man's personal property is at his domicile rests on the fiction of the common law expressed in the maxim *mobilia sequuntur personam.* The fiction and the maxim date back to mediaeval days and conditions, as this and other courts have frequently noted.

Eidman v. *Martinez,* 184 U. S. 578, 581.
Pullman Co. v. *Pennsylvania,* 141 U. S. 18.
Catlin v. *Hull,* 21 Vt. 152, 159.

The fiction and the maxim have their place, not primarily in the law of taxation—indeed, it is doubtful whether until a late date they had any place in that law—but in the field of conflict of laws. They grew out of mediaeval conditions and mediaeval speculation on the law. When a property owner was under one sovereign, and the property under another, and another interested party under a third, perhaps, it was necessary to have some rule by which to decide what system of law should apply to the determination of rights in and disputes over that property. Quite obviously the sovereign with whom the property lay had the ultimate power, if he so chose, to apply his own law, and indeed so long as each nation had but one system of law the problem was of little practical importance. The sovereign controlling the property dealt with it according to his law. But when systems of federated states, as in the case of the Netherlands, or empires, as in the case of England, with distinct systems of law under one sovereign, began to make their appearance, then questions of conflict of laws became of vital importance.

Because of the peculiarities of the social and economic systems which existed then, the rules for determining conflict as to personal property took a different direction from those governing conflict relating to land. Land was the basis of wealth, of political economy, of the social structure. Toward it the attention of the law was particularly

directed. No sovereign could afford to surrender to any other the right to determine questions relating to land within his territory. So as to conflicts over land the rule always was that the law of the situs alone should govern.

Movables were different in many ways. The differences need not be analyzed. Probably the principal factor was that they were in no respect of the same importance as land. Suffice it to say that two schools of thought grew up, one referring questions relating to movables to the law of the owner's domicile, the other to the law of the situs.

Early English law followed the first school. Whether Huber was or was not its chief exponent, Prof. Lorenzen's treatise on his *Conflict of Laws* gives an excellent picture of the conflicting views, the adoption of the domiciliary theory in English law, and its scope.

> *Huber's de Conflictu Legum*, by Ernest G. Lorenzen, *Wigmore Celebration Legal Essays*, p. 199.

However satisfactory the maxim *mobilia personam sequuntur* may have been under simpler conditions, it is of little practical value now. It was always a mere fiction, a rule of comity, subject to any exceptions which the sovereign of situs might choose to make, and to his notion of proper policy. Because of its antiquity and the respect paid to its early sponsors, it is even now the recipient of constant tribute, but that tribute is little more than lip service. Perhaps the most graphic picture of the change in the law is to be found in an article by Wharton.

> *Late Works on Private International Law*, by Francis Wharton, 6 So. Law Rev. (N. S.) 680 (1880).

Commencing at page 686, he discusses the attitude of the modern law toward the old maxim, and says in part:

> "In the repudiation of another formula, equally venerable and equally absurd, it is a comfort to find the high authorities before us concur. *Mobilia sequuntur personam*, the old writers seemed to hold to be an assertion they were bound to make as a preliminary to the discussion of movables. It was a truism in which, however false in the concrete, every one concurred, accepting it as a sort of formal starting-point. It took, therefore, somewhat the same position in international exposition as does the maxim that all men are created equal, in political harangues. We know that no two men are created equal; that there never have been two men exactly alike, but that there are in each man specific qualities belonging to himself alone; yet, nevertheless, we make the assertion as a commonplace preliminary. So with regard to the maxim *Mobilia sequuntur personam*. There was a time when it may have been in a measure true, just as there is a time in early infancy in which two children may appear exactly alike."

Then he goes on to contrast the situation of personal property and of owners of such property in mediaeval times and now, and to illustrate the absurdity of the rule by half a dozen instances which he mentions (pp. 687-688).

Story is regarded as the American authority on conflict of laws. While he states the view that the rule *mobilia sequuntur personam* is a commonplace of Anglo-American law, yet every time that he undertakes detailed discussion of its application it immediately appears that the maxim is simply a fiction, subject always to such exceptions as the sovereign of the situs chooses to make, that in practice these exceptions are very frequent, *and that when these exceptions, based on fact, exist, the fiction necessarily is discarded.**

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* It is interesting to note the stages of development as shown by the successive editions of his work. The eighth edition, printed in 1883, is so arranged that the text and numbered footnotes represent Story's own opinions as expressed in the first three editions, while the lettered foot-

See also comment in the following legal articles:

Beale, The Situs of Things, 28 Yale Law Journal 525, 528.

Seefurth, Recent Limitations on the Power to Impose Inheritance and Estate Taxes, 25 Col. Law Rev. 870.

Lorenzen, Extraterritorial Succession Taxes, 1 Conn. Bar Journal 154, 157-158.

Articles on Inheritance Taxation, 14 Col. Law Rev. 225, 228; 24 Mich. Law Rev. 50, 52.

Article discussing the weakness of the maxim, 40 Harv. Law Rev. 989.

It is useless for the purposes of this brief to follow the history of the rule in its various applications. The point is that the rule has no special place in the law of taxation, that it stands there as throughout the field of the conflict of laws simply as a fiction of the law and rule of comity, fair and equitable so long as it is the only rule controlling the property. When, however, another sovereign declares

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notes represent additions both to text and citations by the editors of the subsequent editions. Speaking of the transfer of movables, Story himself says that they are determined by the laws of the owner's domicile, although he then proceeds promptly to notice exceptions, such as contracts relating to stocks and bonds where the law of the situs governs (pp. 542-543). But then to this discussion the later editor has added a most significant note, which begins:

> "(a) *Mobilia sequuntur personam.—The exceptions to the maxim mobilia sequuntur personam have become so numerous that it cannot be safely invoked for the decision of any but the simplest cases at the present day; if indeed a case can ever be safely decided upon a maxim.* The exceptions would probably be less frequent if the maxim were *lex situs mobilia regit.*
>
> *But no maxim is needed; any would be apt to mislead. The question is, how far will a state permit a non-resident* having personalty within its limits, or the creditors resident or non-resident of such a person, or the course of the foreign law under which the non-resident owner is domiciled, *to control that property; and this question should be decided upon its merits, uninfluenced by maxim.* The answer to the question will depend partly on the nature of the property and partly upon the mode of disposing of it or affecting it."

an actual situs elsewhere and acts on that declaration, then in every other field than that of taxation, it is admitted that the fact and fiction are inconsistent, and when the fact is recognized the fiction must be put aside. This rule should hold as well in matters of taxation as elsewhere. Courts frequently declare that it does. Case after case has made the declaration that the maxim represents only a fiction adopted from considerations of convenience and policy and that always it must yield to fact and equity. Its origin and limitations are well understood.

Deganay v. *Lederer*, 250 U. S. 376.
Liverpool etc. Ins. Co. v. *Assessors*, 221 U. S. 346.
Buck v. *Beach*, 206 U. S. 392.
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S. 395.
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194.
Board of Assessors v. *Comptoire Nationale*, 191 U. S. 388.
Blackstone v. *Miller*, 188 U. S. 199.
Eidman v. *Martinez*, 184 U. S. 578.
Bristol v. *Washington County*, 177 U. S. 133.
Pullman Co. v. *Penn.*, 141 U. S. 18.
Bonaparte v. *The Tax Court*, 104 U. S. 592.
Kirtland v. *Hotchkiss*, 100 U. S. 491.
St. Louis v. *Ferry Co.*, 11 Wall. 423.
Wilcox v. *Ellis*, 14 Kan. 588.
In re Jefferson, 35 Minn. 215.
Parsons v. *Lyman*, 20 N. Y. 103.
Hoyt v. *Commissioners*, 23 N. Y. 224.
People ex rel. Jefferson v. *Smith*, 88 N. Y. 576.
Matter of Swift, 137 N. Y. 77.
Matter of Scott, 129 Misc. 625.
Redmond v. *Commissioners*, 87 N. C. 122.
Small's Estate, 151 Pa. 1.
Hostetter's Estate, 267 Pa. 193.
Catlin v. *Hull*, 21 Vt. 152, 159.

The attitude of the courts is well expressed in the following quotation from *Catlin* v. *Hull*, a leading case:

> "It is undoubtedly true, that, by the generally acknowledged principles of public law, personal chattels follow the person of the owner, and that, upon his death, they are to be distributed according to the law of his *domicil;* and in general, any conveyance of chattels, good by the law of his own *domicil,* will be good elsewhere. But this rule is merely a legal fiction, adopted from considerations of general convenience and policy, for the benefit of commerce and to enable persons to dispose of their property, at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country, where the same is situated. *But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country, where the property is in fact, which contravenes the law of his domicil; for if there is, the law of the owner's domicil must yield to the law of the state, where the property is in fact situate.*"

(d) DEVELOPMENT OF THE LAW OF SITUS FOR TAXATION. THE SHIFT FROM *lex domicilii* TO *lex situs.*

All this being so, how may we account for the situation which exists in the law of taxation, recognizing one situs only for the taxation of tangibles, recognizing an actual situs away from the domicile for intangibles, but nevertheless declaring that intangibles also have a situs at the domicile and may be taxed there. We think that the explanation lies in the development of the law in the last half century, and that many state courts have already recognized the fact that the actual situs for intangibles precludes a fictional situs at the same time.

Before we study this development of the law two or three general observations are pertinent.

In the first place, the peculiarities arising out of our constitutional system are to be noted.

The sovereign in the true sense is concerned only with questions of power. If he has the property within his control he can do with it what he chooses. If he has the owner of the property within his control he can do whatever through force and duress he can persuade the owner to do. If the property is there fully subject to his control he can collect taxes from it; if the owner is there presumably he can exert sufficient pressure on the owner to make him pay taxes, though the actual money comes from some other source than the property to which the taxation relates. So as to the United States, though it is a sovereign of limited powers, it is not limited in its right of taxation to things within its territorial limits, but if a non-resident citizen owns property abroad, it may still tax him in relation to that property through its control over him as a citizen and in return for the protection and benefits afforded him and his property. The same freedom does not exist as between the states, because under our federal system of government, where the power of one state ends, the power of the other begins, and none may infringe on the rights of the others.

Cook v. *Tait*, 265 U. S. 47.
U. S. v. *Bennett*, 232 U. S. 299.

The law and the fact being established, as they are, that personal property, whether tangible or intangible, having an actual situs outside a state is beyond that state's control, then taxation can be levied on it only through control of the owner, or by impressing the decrees of its courts upon other property which the owner is unfortunate enough to have within its territory. Here our constitutional system comes into play. Control of the owner is enough for the full fledged sovereign; whether it is enough

for our states is a question to which this court appears to have given differing answers, saying sometimes that such a tax is really a tax on the property and hence forbidden, and at others that the tax, not being on the property, may nevertheless be measured by the property (compare *D., L. & W.* v. *Pa.* group, p. 84, with *Kirtland* case, *infra,* p. 86, and group commencing with *Kidd* case, *infra,* p. 91). As to the second possibility, this court has said definitely that the existence of other property within the jurisdiction is not sufficient justification for the imposition of a tax on property which itself is beyond the state's control (*supra,* p. 57).

In short, the power of a state ends at its borders, but just what that rule means in its application depends sometimes on what this court declares to constitute due process of law.

In the second place, we ought to recognize frankly why the fiction persists in the law of taxation beyond its limitations in other fields of the law. It is simply because in deciding between two private litigants, facts, equities and practical considerations are readily accepted, but in this question of taxation the recognition of these elements would result in a limitation of the field of taxation open to each state which its courts are unwilling to make. It is a serious responsibility for a court to say to its legislature that a system of taxation followed for years is unconstitutional. Few state courts undertook that responsibility in the field of general taxation of tangible property until they were driven to it by the decision of this court in the *Union Refrigerator* case; few undertook it in the field of transfer taxation of tangibles until this court rendered its decision in the *Frick* case. Yet the rule of the *Union Refrigerator* case now seems self-evident, and the rule of the *Frick* case, still protested by a few, is more and more accepted as stating an obvious proposition of law.

See discussion:

> Powell, *Extraterritorial Inheritance Taxation*, 20 Col. L. Rev. 283, 295-296.

In the third place, we think we ought to correct the fallacy which has been expressed in some cases that a tax levied where the debt can be controlled (when that is the place of the debtor's domicile) is based on the theory that it is on the debtor's property. Of course, that is not the theory of the tax at all. The tax rests on the property of the creditor, but is levied on it at the place where it is in fact, i. e., its situs, where it can be controlled.

Next we want to call attention again to the comparatively slight importance of situs in transfer tax cases if the place of the transfer can be determined irrespective of situs. This court itself said in *Eidman* v. *Martinez*, 184 U. S. 578, 589:

> "The actual situs of the property in such cases cuts but a small figure while in the case of general taxes upon such property it is now considered determinative of the whole question." See also *Lorenzen, Extraterritorial Succession Taxes*, 1 Conn. Bar Journal 154, 161.

Lastly, it must be remembered that in the field of taxation, as in every other field where it was applicable, the maxim *mobilia sequuntur personam* applied to tangibles and intangibles in exactly the same sense. This court has so declared.

> *Blackstone* v. *Miller*, 188 U. S. 189.
> *Buck* v. *Beach*, 206 U. S. 392.
> *Bristol* v. *Washington County*, 177 U. S. 133.
> *Eidman* v. *Martinez*, 184 U. S. 578, 582.

See also:

People ex rel. Jefferson v. *Smith*, 88 N. Y. 576.
Wilcox v. *Ellis*, 14 Kan. 588, 603.

With this signpost to guide us, it will be most interesting to inquire why, at this stage of the law, a distinction between the two has suddenly become apparent, and why the rules which for years were applied to tangibles and intangibles alike, were found to be unjust where tangibles were involved, but are still fair and sound for intangibles.

In analyzing the cases to show the growth of the law, it is not possible to group the cases with absolute certainty. The chronological factor cannot be ignored, but, on the other hand, it is not an absolute test. Dependence on different principles overlap in point of time. Nor is it true that because the apparently decided principle in one case relates it definitely to one group, that there are not in it features or declarations placing it in some measure in a different group. The confusion in the law is graphically described by Professor Powell, in his usual salty and somewhat disrespectful style:

Powell, Situs of Business Credits, W. Va. Law Quarterly (Jan., 1922).

The classification which we suggest is, therefore, purely relative but we think it is sufficiently accurate to indicate the changes in the law.

Since the law determining the situs of tangibles has consistently developed ahead of that relative to intangibles, we discuss it first.

The following cases recognize that tangible property has an actual situs for tax purposes where it is, but they

do not deny the continuance of a situs at the domicile at the same time, based on the fiction:

Coe v. *Errol*, 116 U. S. 517 (1886).
Maryc v. *B. & O. Railroad Co.*, 127 U. S. 117 (1888).

See also discussion of principle in

Pullman Co. v. *Pennsylvania*, 141 U. S. 18 (1891), especially the dissenting opinion.

Now, it must be remembered that at this point the struggle was not to avoid the fiction, but quite the contrary—it was assumed as a matter of course that the property had a situs at the owner's domicile and the question was whether there was any justification for recognizing its actual situs as well and permitting taxation there. Although the fiction was still recognized, these decisions are distinct steps away from it in that they recognize and rely on the fact. Only, as yet, the inconsistency of the fact and the fiction are not acknowledged.

For twenty years the law remained at this stage. The next steps were taken only in 1905 and 1906.

D. L. & W. R. R. Co. v. *Pennsylvania*, 198 U. S. 341 (1905).
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194 (1905).

While the earlier decision seems to have established exactly the same principle, the *Union Refrigerator* decision is considered as the leading case. It held that the maxim *mobilia sequuntur personam* had yielded, so far as tangible property was concerned, to the fact of an actual situs having no connection with the owner's domicile, that this was an outgrowth of modern conditions, and that since a state could not tax property outside its

territory, and since tangibles physically beyond its boundaries were as much outside of the state as land similarly situated, the right founded on the fiction to tax the property at the domicile had been dissipated.

However, said the Court: *"This case does not involve * * * inheritance or succession taxes * * * which are controlled by different considerations."* For twenty years, therefore, the state courts continued to treat tangible personalty, so far as transfer taxes were concerned, as having a situs at the owner's domicile. The rule was reversed only under the compulsion of the decision in

Frick v. *Pennsylvania*, 268 U. S. 473.

The principles of that case are too recent to need elaboration. Turning, as it does, primarily on the declaration that the transfer takes place by the laws of the state having actual control of the property, it adds that that tangible property has but one situs, its actual location, for all tax purposes.

It will be observed that between the first and the last cases cited there elapsed a period of forty years. The principles established by the *Union Refrigerator* and the *Frick* cases may seem self-evident now but they were not enunciated so easily, and pending the decision of those two cases the state courts consistently relied on both the fiction and the fact to extend the field of taxation of their respective states as far as possible.

The course of the development of the law as to the situs of intangibles has been identical, except that the final step—the declaration that the actual situs of intangibles is exclusive so far as taxation is concerned—is not so definitely established. Nevertheless, there are weighty decisions already going the full distance.

So far as intangibles are concerned, we start again from the position that, by virtue of the fiction, they follow the

owner to his domicile. Now, where tangibles were concerned, anyone with eyes could see that they did not follow the owner to his domicile. The matter was not as simple where intangibles were involved. Because they are intangible, they have no actual location. Their situs must necessarily be a legal concept. They are the more easily identified, therefore, with the fiction; and it is the more difficult, first to establish an actual situs away from the domicile, and then to satisfy courts that this actual situs is in fact exclusive and is just as inconsistent with the fictional situs as in the case of intangibles. As a result, the allocation of an actual situs to intangibles was not reached in one step as it was with tangibles. It came from a cautious extension of the law based on successive experiments.

We ought to say that while, to shorten the discussion, we have treated the cases down to the last group as permitting the double taxation of intangibles, they do not all in fact make that declaration. A considerable number state principles sufficiently broad to establish an exclusive situs away from the domicile. We assume that the declarations did not establish an exclusive situs simply because concurrently there are other decisions permitting taxation of similar intangibles at the domicile.

In the first group from 1873 to 1898, we find four cases:

> *Tappan* v. *Merchants Bank*, 19 Wall. 490 (1873).
> *Kirtland* v. *Hotchkiss*, 100 U. S. 491 (1879).
> *Bonaparte* v. *Tax Court*, 104 U. S. 592 (1881).
> *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421 (1898).

Of these four, the *Tappan* case and the *Multnomah County* case established situs away from the domicile, on the basis of a special localization of the property involved—in the one case stock, in the other case a mortgage debt—by virtue of state statutes. Both of these opinions

seem to be consistent with an actual situs exclusive of the domicile. Nor are the companion *Kirtland* and *Bonaparte* cases contrary, because, while both permit taxation at the domicile, the first is explicable as a personal tax, not on the property, but measured by the property; and the other by the fact, which the court points out, that there was no special statute establishing an actual situs away from the domicile.

We think the *Tappan* and *Multnomah County* cases were tentative ventures into allocation of a situs to intangibles. Commencing in 1899, however, this court found it practicable to establish a definite principle by which the actual situs of certain classes of intangibles away from the domicile might be tested.

New Orleans v. *Stempel,* 175 U. S. 309 (1899).
Bristol v. *Washington County,* 177 U. S. 133 (1900).
Board of Assessors v. *Comptoir National,* 191 U. S. 388 (1903).
Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S. 395 (1907).
Liverpool etc. Ins. Co. v. *Assessors,* 221 U. S. 346 (1911).

It is of some importance to note that in establishing these principles, the court approved and followed the practice and the principles enunciated by a number of state courts at an earlier period.

In re Jefferson, 35 Minn. 215, 218 (1886).
Catlin v. *Hull,* 21 Vt. 152, recognized as the leading case (1849).
Redmond v. *Commissioners,* 87 N. C. 122 (1882).
Billinghurst v. *Spink County,* 5 S. D. 84 (1894).
Hoyt v. *Commissioners,* 23 N. Y. 224 (1861).

The experimental approach to this problem of finding when a situs away from the domicile could safely be declared is very evident in this group. In the *New Orleans* case, the elements of a "business situs" were said to be continuity of dealing, the investment, collection and reinvestment of funds, management by a resident agent and the presence of the evidences of indebtedness. Each successive case modifies these requirements a trifle. In the *Comptoire Nationale* case, the form of the evidence (checks) was less definite than usual. In the *Bristol* case the evidences had been in Minnesota but were removed especially to avoid taxation. In the *Metropolitan Life Insurance Co.* case the evidences were removed as soon as executed and returned only when necessary for the purpose of collection or similar use. In the *Liverpool Insurance Co.* case there was no evidence of the indebtedness at all but the intangibles were pure credits.

Before we leave this group of cases, it is essential again to note the importance of localization away from the domicile in the decisions reached. That, throughout, appears to have been the final test by which the actual situs was determined. Its importance we shall appreciate more fully when we come to discuss the localization of the intangibles involved in this case (*infra*, p. 103).

Based on the consideration of the business situs cases, it was evidently considered practicable to allocate an actual situs to any intangible property when it could be said to be sufficiently localized away from the domicile.

Corry v. *Baltimore*, 196 U. S. 466 (1905).
Hawley v. *Malden*, 232 U. S. 1 (1914).
Rogers v. *Hennepin County*, 240 U. S. 184 (1916).

In the *Corry* and *Hawley* cases, stock was localized at the domicile of the corporation. In the *Rogers* case, the intangible was localized at the seat of the grain exchange.

Coincident with the growth of this law of situs in property tax cases there grew up another class dealing with transfer taxation and likewise fixing an actual situs for intangibles away from the domicile.

Eidman v. *Martinez*, 184 U. S. 578 (1902).
Moore v. *Ruckgaber*, 184 U. S. 593 (1902).
Blackstone v. *Miller*, 188 U. S. 189 (1903).
Wheeler v. *Sohmer*, 233 U. S. 434 (1914).

It may seem, from the date of these decisions, that they were really an earlier development of the law than the property tax cases to which we have referred. But we think that this apparently earlier development is really explained by the fact that they rested upon a somewhat different principle. Because the tax involved was not directly on the property but was on the transfer of that property, they were not so much concerned with the situs of the property as a general proposition, as with the place where the transfer took place, and that, they said, was where the property could be controlled and administered, and declarations of its situs at that place were really incidental to the finding that the transfer took place there. So far as situs was involved, it was for a special purpose and was more easily located because of the certainty where the transfer occurred. The declarations in the *Eidman* and *Moore* cases are, of course, *dicta*, since construction of the statute involved lead the court to the conclusion that no tax was intended. But the same principles were applied in the *Blackstone* case to a bank account, resulting in its taxation at an actual situs, and when that decision is read in connection with the explanation of the concurring judges in the *Wheeler* case, it is evident that the place of transfer was of major importance in determining what was said about the situs of the property.

All of these cases are, we think, successive steps in the attempt to escape from the restraining hand of the fiction and permit taxation in accordance with the actual and obvious fact of control and situs away from the domicile. In all of the cases it will be noted how easily and thoroughly the intangible involved could be localized at the point where a situs was given. Situs was determined on precisely the considerations which we have emphasized. Where can the obligation be enforced? To what jurisdiction can one turn for aid in its collection and realization? Can the jurisdiction attempting to levy the tax lend any aid in its enjoyment? Can it afford any measure of protection? These are the questions by which the actual jurisdiction of intangibles was determined. Where protection and enforcement are granted, there and at that point only, the intangible obviously is, said the courts. Contrary to the fiction, it does not in fact follow the creditor, for where the creditor is, no single right in the intangible can be enforced.

We do not know that the reason for this rule is stated more clearly or succinctly than in *Redmond* v. *Commissioners*, 87 N. C. 122, where the court says:

> "Their validity and protection, and the remedies for their enforcement, all depend upon the laws of this state, and in neither respect (or in any other that we can now think of) do they take any benefit from the laws of the plaintiffs' domicil. It is but just, therefore, that they should contribute towards the support of the only government which affords them protection, and help to defray the expenses incurred in so doing.
>
> "The actual situs and control of the property within this state, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here; and the legal fiction, which is sometimes for other purposes indulged,

> that it is deemed to follow the person of the owner, and to be present at the place of his domicil, has no application. In such case, the maxim *mobilia personam sequuntur* gives way to the other maxim *in fictione juris semper aequitas existat.*"

Since this development of the law, if we are right in our analysis, simply parallels the development of the law in relation to tangibles, we ought not be surprised to find that, coincident with these cases, there are others permitting taxation of similar intangibles at the owner's domicile—that the law has not yet fully shaken off the hand of the fiction. It recognizes the fact, but tentatively, not with sufficient certainty and force to declare the fiction inconsistent. Accordingly, there is a line of decisions permitting taxation of intangibles at the domicile of the owner.

Kidd v. Alabama, 188 U. S. 730 (1903).

Fidelity & Columbia Trust Co. v. *Louisville,* 245 U. S. 54 (1917).

Cream of Wheat Co. v. *Grand Forks,* 253 U. S. 325 (1920).

Citizens National Bank v. *Durr,* 257 U. S. 99 (1921).

Bullen v. *Wisconsin,* 240 U. S. 625 (1916).

See also *dictum* in

Rhode Island Hospital Trust Co. v. *Doughton,* 270 U. S. 69 (1926).

The foregoing cases might well be explained by their place in the development of the law, but as a matter of fact we think there is an additional ground of distinction. The first four cases were all property tax cases and to some extent at least rest on the theory that a state where a man lives might levy a personal tax on him measured

by the total value of the property which he owned. In the *Kidd* case there were stock certificates at the owner's domicile which could be reached. The *Rhode Island* case, of course, is purely *dictum*, and the *Bullen* case we shall discuss separately at a later point (*infra*, p. 99).

Now, it seems to us that the law dealing with the situs of intangibles has reached exactly the stage of that dealing with tangibles just before the decision of the *Union Refrigerator* case. Experience and practice have shown the practicability of allocating a definite situs to such intangibles as are involved in these appeals and in the cases cited. Why, then, if those intangibles have an actual situs, does not that actual situs exclude a situs based on fiction at the domicile?

We have shown how the fiction was one of convenience and comity, never an absolute rule, but always subject to exceptions made to it by the law of actual situs. In exceptional cases it may also be a rule of equity. In *Southern Pacific Co.* v. *Kentucky*, 226 U. S. 62, the court was confronted with a case where tangible property, steamships, had no permanent actual situs and, lacking the application of the fiction, the property would have escaped taxation entirely. That case clearly suggests the proper place of the fiction in the law.

The *Union Refrigerator* case rests squarely on the fact that the state can tax only such property as is within its boundaries. Where tangible property physically is outside, it was held to be beyond the jurisdiction of the state, the legal situs and the actual situs coinciding. But we have already shown that the situs of the tangibles at the place where they exist physically is merely a coincidence—that, really, situs is determined by control. Now, if intangibles can be given so definite a situs away from the domicile, how can they exist at the same time at the domicile? There are no more two pieces of property than there are

in the case of tangibles. The intangible no less has a situs away from the domicile because it cannot be seen or touched. Where it is, is a matter of legal concept and declaration, but when this court says that it is located in a state away from the domicile, how can it be at the domicile at the same time? The suggestion in the *Cream of Wheat* case, that double taxation *per se* is not constitutional, does not seem to us to meet the issue. We are not concerned here with double taxation as such. *We are concerned with the declaration that two things exist in two places when, in fact, there is only one thing and it can be only in one place.*

While double taxation as such is not unconstitutional, neither is it a factor to be ignored. If it is clear that two states have equal jurisdiction over a subject of taxation—as, perhaps, in the case of the stock of a Connecticut corporation in this case—then it must be granted that neither need yield to the other. But certainly those cases ought to be exceptional, and the fact that two states claim equal jurisdiction ought to induce close scrutiny of the claims to determine in fact whether both can be justified. The court, in the *Frick* case, quoted from the *Union Refrigerator* decision as follows:

> "The adoption of a general rule that tangible personal property in other states may be taxed at the domicile of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other states or even in foreign countries, and of stocks of goods and merchandise kept at branch establishments when already taxed at the state of their situs, but of that enormous mass of personal property belonging to railways and other corporations which might be taxed in the state where they are incorporated, though their charters contemplated the construction and operation of roads wholly outside the state,

and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection."

For an excellent study of these principles, see the articles *Validity of Inheritance Taxation Measured in Part by Value of Foreign Personalty*, 39 Harv. Law Rev. 250, and Beale's *Progress of the Law, 1923-1924, Taxation*, 38 Harv. Law Rev. 281, 283, and also thorough discussion in Powell, *Extraterritorial Inheritance Taxation*, 20 Col. Law Rev., at p. 289 *et seq.*

The arguments and the economic considerations set forth apply ten-fold to intangible property, now so much more important both in amount and use than tangible property.

With the determination that intangibles can have an actual situs away from domicile, the obvious evil and injustice of permitting them to be taxed in two places, the inconsistency of the fact and the fiction, and the fact that in every other branch of the law where the fact appears the fiction yields, it would be most surprising if we did not find decisions holding that intangible property had a situs exclusive of any other situs based on the fiction. Such cases we find.

Louisville & J. Ferry Co. v. *Kentucky*, 188 U. S. 385, 395 *et seq.* (1903).
Wilcox v. *Ellis*, 14 Kan. 588 (1875).
Fisher v. *Commissioners*, 19 Kan. 414 (1877).
Poppelton v. *Yamhill County*, 18 Ore. 377 (1890).
Hoyt v. *Commissioners*, 23 N. Y. 224 (1861).
Taylor v. *St. Louis County*, 47 Mo. 594 (1871).
Commonwealth v. *Avery & Sons*, 163 Ky. 828 (1915).
Berry v. *Windham*, 59 N. H. 288 (1879).
Laidlay v. *Lord Advocate*, 1890 App. Cas. 468.

Compare also:

> *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567 (1926).

In the *Louisville Ferry* case, the question arose whether Kentucky, the state of incorporation, could levy a tax upon the entire property of the corporation, *including a franchise granted by the State of Indiana,* on the theory that the corporation was domiciled in Kentucky and all its property followed it. The United States Supreme Court declared that Kentucky could not tax the Indiana franchise:

> "There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax the property right, *an incorporeal hereditament, which has its situs in Indiana.* While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, *that power is limited by a principle inhering in the very nature of constitutional government, namely that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government*" (citing cases).

This case, since its decision, has been rested on the ground that the intangible property involved was an incorporeal hereditament of the nature of real property, and therefore its situs was to be determined by special rules. All this may be true. But, nevertheless, the decision means that, having intangible property linked for some particular reason with a particular locality away from the owner's domicile, its exclusive situs is there, and we contend that precisely the same reasoning, applied to intangible property involved in the present case, gives it as definite a situs outside Connecticut and in New York, which by the same reasoning should be exclusive.

In *Wilcox* v. *Ellis, supra,* a leading case, cited with approval by the United States Supreme Court in *New Orleans* v. *Stempel,* 175 U. S. 309, at 318, a resident of Kansas had loaned money in Illinois, secured by notes. The notes were located in Illinois and payments were made there. The question was whether Kansas could tax this debt as property attached to the person of the creditor.

> "Then what is there in Kansas to be taxed? Certainly no tangible property; and not even any intangible property that needs any protection from our laws. Everything is and has been in Illinois—the consideration for the notes, the notes themselves, the place of payment, the persons to whom the notes are to be paid, and presumptively the payors, and the funds which must be used in paying the notes, all are in Illinois and have never been in Kansas. Nothing pertaining to the notes, or to the debt which they evidence, has ever been in Kansas except that the owner of the notes resides in Kansas. Every act which brought the notes or the debt into existence was performed in Illinois, and every act that may be performed in the future for their collection, payment, or extinguishment, must also be performed there. The claim that said debt is taxable in this state is founded entirely upon the maxim, *Mobilia sequuntur personam.* Under this maxim it is claimed that movable property follows the *residence* or *domicile* of the owner (not his *person*), and therefore that personal property may be taxed at the residence of the owner wherever he may be, and wherever the property may in fact be. *This maxim would seem from its terms to apply to all movable property, tangible as well as intangible, and it is generally so applied wherever it is applied at all.* But the defendant desires to make a distinction. While he seems to admit that by the weight of judicial determination the maxim does not fully apply for the purposes of taxation to tangible movable property, yet he nevertheless claims

that it does apply with all its force to intangible personal property. We think, however, he is mistaken. *The weight of judicial authority seems to be that for the purposes of taxation the maxim does not fully apply even where the property is intangible. People* v. *Gardner*, 51 Barbour, 352; *Catlin* v. *Hull*, 21 Vt. 152; *People* v. *Trustees, &c.*, 48 N. Y. 397; and other authorities cited in plaintiff's brief. This maxim is at most only a legal fiction; and Blackstone, speaking of legal fictions, says, 'This maxim is invariably observed, that *no fiction shall extend to work an injury*, its proper operation being to prevent a mischief, or remedy an inconvenience that might result from the general rule of law.' (3 Blackstone Com., 43.) Now as the state of Illinois and not Kansas must furnish the plaintiff with all the remedies that he may have for the enforcement of all his rights connected with said notes, debt, etc., it would seem more just, if said debt is to be taxed at all, that the state of Illinois and not Kansas should tax it, and that we should not resort to legal fictions to give the state of Kansas the right to tax it."

It is unnecessary to discuss the other cases at length. These two are typical. There are, of course, cases declaring contrary principles. We said at the outset that the decisions were most contradictory and difficult to analyze. Without the key to the growth of the law, it would be wholly impossible to reconcile the declarations even of a single tribunal such as those of the United States Supreme Court. But when it is remembered that in the middle of the last century the courts started from a doctrine that all personal property, tangible or intangible, had its situs with the owner, that gradually there became apparent the present inequity of that rule and the practical difficulties which it offered in modern commercial life, that it was first held that tangible property had a situs at the point of its physical location and then that intangible property

had a situs where the obligation could be controlled, that originally both classes of property were held subject to double taxation and that then the courts saw the injustice of this and laid down the rule that tangible property could be taxed only where it was located, we have a key which explains the apparent contradictions to be found throughout the reports.

Blackstone v. *Miller,* 188 U. S. 189 is sometimes urged as an authority against our view, but it is not such in fact because the tax permitted was by the jurisdiction of actual situs. In any case, it rests its entire decision upon the analogy between tangible and intangible property and their situs.

> "To come closer to the point, no one doubts that succession to a *tangible chattel* may be taxed wherever the property is found, and none the less, the law of the situs accepts its rules of succession from the law of the domicile, or that *by the law of the domicile the chattel is part of a universitas and is taken into account again in the succession tax there*" (p. 204).

Again:

> "We perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim, *Mobila sequuntur personam, has no more truth in the one case than in the other*" (p. 206).

The case was obviously decided at a time when the court either permitted the double taxation of tangible chattels or still supposed that there was a distinction between a tax on the transfer of chattels and on the chattels themselves. *Both of these principles are squarely and expressly*

overruled by the Frick decision. They are no longer the law.

So in *Bullen* v. *Wisconsin,* 240 U. S. 625, the Supreme Court upheld transfer taxation of certain property by the state of domicile which had already been taxed by the state of situs. But it will be found that the whole decision rests upon the treatment of personal property as a part of a *universitas* and upon the assumption that it is necessary to invoke the law of domicile to complete the transfer, and hence the state of domicile has jurisdiction of the transfer though not of the property. *This principle is categorically overruled by the decision in the Frick case.*

As the court says in the *Frick* decision:

> "The power to regulate the transmission, administration and distribution of tangible personal property on the death of the owner rests with the state of its situs and that the laws of other states have no bearing, save as that state expressly or tacitly adopts them—their bearing then being attributable to such adoption and not to any force of their own" (citing cases).

In other words, the question of taxation of a transfer, equally with that of the property itself, is dependent upon jurisdiction and there is no jurisdiction of the transfer unless the act of transfer depends upon the laws of the given state or unless its courts administer the property. In this respect, no distinction is possible between tangible and intangible personalty.

Again, referring specifically to the New York and Massachusetts statutes controlling the personal property involved, the court says that these statutes

> "do not evidence a surrender or abandonment of jurisdiction, if that were admissible. On the contrary, they in themselves are an assertion of jurisdiction and an exercise of it."

And to bring the case even more closely in point with the present one, it continues:

> "And it should be observed that here the property was administered in those courts and none of it was taken to the domiciliary state."

This is the very situation which exists in the present case, where the State of New York is actually administering the great majority of the decedent's property.

In so far as the *Bullen* case depends on the theory of a *universitas*, there again it is reconcilable with the *Frick* decision because the principle of a universal succession knew no distinction between tangible and intangible personalty.

True, the *Bullen* case is mentioned in the *Frick* decision without express disapproval. But our question was not at issue in the *Frick* case, and the quotation we have given from the *Union Transit* case (*supra*, p. 85) indicates how little such expressions are to be given weight. The *principles* of the *Frick* and *Bullen* cases are inconsistent.

Then following the *Frick* decision this court rendered its decision in *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567. The property involved in that case consisted of securities. Those securities were in Massachusetts. They were held there by trustees subject to the exercise of a power of appointment. The power of appointment was exercised in North Carolina. Nevertheless, it was held by a majority of this court that the transfer depended wholly for its effectuation on the laws of Massachusetts, and accordingly it was taxable there only. This decision, dealing with precisely the same class of property which was involved in the *Bullen* case, must, we think, be deemed to impeach the principle of that case, and accordingly, to fix the situs of the property involved in these appeals, both for the purpose of determining where

the transfer took place and where it could be taxed, exclusively in the State of New York.

The whole argument is summed up by Carpenter, from whose article we have already quoted. Following his analysis of the decisions, to which we have referred, he goes on to show that the American theory of taxation requires that there be rendered some equivalent of protection, service or benefit in return for the tax exacted, that this cannot be given as to a particular piece of property unless the property is present and subject to control, and that this principle is true as to succession taxes as well as direct taxes (pp. 918-920, citing a long list of cases of the United States and state courts). He points out the fallacy of resting the succession tax upon the supposed privilege given by a state of domicile in permitting the transfer of property located in another state, and his criticism made in 1918 is precisely that adopted as a controlling principle of law by the United States Supreme Court in 1925 in the *Frick* case (pp. 920-922). He then develops his basic contention that since the underlying principle of taxation is protection, service or benefit, these are given only in the state of the debtor's domicile and that alone has jurisdiction to tax. He criticizes the fiction *mobilia sequuntur personam* and says very aptly, "But this fiction can hardly be urged as a ground or justification for the tax. *It is rather a form of stating a result reached and an admission of the non-existence of a reason.*" He shows how often it yields to fact in the decisions of the courts (pp. 923-929). He summarizes his study and conclusions in the following language, which seems to us as a matter of common sense and justice unassailable:

> "Finally there seems to be no reason that can be urged in support of a property or succession tax upon debts at the creditor's domicil that cannot be equally urged to support such a tax against an

owner at his domicil on foreign-held real and tangible personal property. * * * If the property or debtor is outside the jurisdiction there seems to be no essential difference in the power of control over the property from that over the debt or in the protection afforded to the owner of the property from that afforded the owner of the debt by the sovereign of his domicil. If, therefore, a tax at the owner's domicil cannot be supported in case of foreign-owned real estate and chattels, it is difficult to see how it can be supported on other than historical grounds against a creditor at his domicil on debts owed by a foreign debtor.

"On the other hand, every reason which goes to support the taxation of real and tangible personal property at its situs can be urged in support of a tax upon debts against the creditor at the debtor's domicil. The real reason why tangible property is taxable at its situs is not that it occupies space there, but that the sovereign where it is located can exercise control over it there, and thus afford it the protection for which the tax is exacted. In like manner the sovereign of the debtor's domicil has control over the obligation, by having jurisdiction over the debtor, and protects it and the debtor, and makes the debt valuable to the creditor. It profits the foreign creditor as respects the debt in the same way it does the foreign owner of tangible property within its jurisdiction. And in like manner such state and such state alone should be the one to levy the tax."

He is not alone in these views. Not only has the *Frick* case received general commendation, but the necessity of logically extending its principles to intangibles upon the same principles that we have set forth above has been very forcefully advanced.

> Seefurth, *Recent Limitations on the Power to Impose Inheritance and Estate Taxes*, 25 Col. Law Rev. 870, 875.

Beale, *Progress of the Law, 1923-1924, Taxation*, 38 Harv. Law Rev. 281, 283.
Articles on Inheritance Taxation, 24 Mich. Law Rev. 50, 52-53; 14 Cal. Law Rev. 225, 227-228.
Powell, *Extraterritorial Inheritance Taxation*, 20 Col. Law Rev. 283, 303-306.
Lorenzen, *Extraterritorial Succession Taxes*, 1 Conn. Bar Journal 154, 164-170.

(e) THE SITUS OF THE PROPERTY INVOLVED IN THESE APPEALS IS, FOR THE PURPOSES OF THIS CASE, EXCLUSIVELY IN THE STATE OF NEW YORK.

There can be no question that the intangible property involved in these appeals—partnership interest, insurance policy, bank account and stocks—had its actual situs, at least for the purpose of transfer and succession taxation, in New York. Whether during the decedent's lifetime the value of this property could have served as a measure of a personal tax imposed on him at his domicile, is beside the point. The decedent is beyond the reach of the State of Connecticut; any right it now possesses must relate to the transfer, or to the property as such.

The fact that all this property had a situs in New York is well settled by law. It is equally evident as a matter of fact, and this analysis of the fact shows, too, how truly the situs of the property in New York is exclusive.

Here we come again to the principle of localization which we showed was the determining factor in the development of the law of intangibles. It will be observed that every one of the interests involved in this case is just as susceptible of a definite allocation to a particular community as the ferry franchise in the *Louisville Ferry* case, *supra*. There is no reasonable ground for distinction between the fact that that franchise was connected with

realty and these interests are not. The weakness of the historical distinction we have pointed out. The interests were all here in New York subject to control here and here alone, connected definitely with New York County, and as a matter of fact and common sense having no substantial connection with any other place.

PARTNERSHIP.

The decedent's interest in the partnership is an obligation due from the surviving partners to the executors of the estate. If any question of enforcing this right arises, the courts of New York alone can give relief. The executors are there, the partners are there, the property so far as it has physical existence is there. There is in the State of Connecticut, out of over three and a half million dollars in partnership assets, a total of thirty-three hundred dollars, represented by accounts receivable from Connecticut debtors (R. 8-9, par. 9). This thirty-three hundred dollars is the sum total of the property as to which the State of Connecticut can exercise control. If the partners and the executors agree between themselves, they can make whatever disposition they wish of the decedent's interest in the partnership and the State of Connecticut cannot stop them, and it can give no other party any right which will be recognized or enforced by the courts of New York, to which such parties ultimately must have recourse.

It is well settled in New York and elsewhere that the situs of a partnership interest, whether in the hands of a living partner or due from surviving partners to his representatives, is where the partnership interest is.

See cases cited *supra*, page 42, and in addition:

Tappan v. *Merchants Bank*, 19 Wall. 490, 503;
Matter of Bijur, 127 Misc. 206;
Bliss v. *Bliss*, 221 Mass. 201;
Small's Estate, 151 Pa. 1;
Laidlay v. *Lord Advocate*, 1890 App. Cas. 468;
Commissioner v. *Salting*, 1907 App. Cas. 449;

and compare

Rogers v. *Hennepin County*, 240 U. S. 184;
Travis v. *Yale & Towne Mfg. Co.*, 252 U. S. 60;
Citizens Nat'l Bank v. *Durr*, 257 U. S. 99, dissenting opinion;
Shaw v. *Hartford*, 56 Conn. 351;
Jollier v. *Rascoe*, 62 Miss. 69,

dealing with the situs of a business.

INSURANCE AND BANK ACCOUNT.

The life insurance policy and the savings bank account, each owed by New York corporations and physically in New York, are in the same situation. The State of Connecticut must find it utterly impossible to lay a hand upon either of these items, to aid in their enjoyment, or to interfere with their disposition. The State of New York, on the contrary, by its control of the debtor corporations, had plenary jurisdiction of the debts.

See cases cited *supra*, page 42, and in addition:

Matter of Scott, 129 Misc. 625.
Pope v. *Hartford*, 82 Conn. 406.
Ewing v. *Warren*, 144 Miss. 233.

STOCK.

Similarly as to the stocks owned by the decedent. Leaving aside the three shares of Stamford Theatre stock valued at $120, the State of Connecticut could exercise not the slightest control over any of these corporate stocks. The certificates themselves were physically in New York and again subject to the control of that state, because its officers could take physical possession of them. The very great bulk of the stock owned by the decedent at the time of his death was in New York and New Jersey corporations. Out of a total value of $277,984.25 the New York and New Jersey stocks were valued at $269,098.75. The only other items of stock were forty-seven shares of the Canadian Bank of Commerce, valued at $8,765.50, and the three shares of Stamford Theatre stock at $120 (R. 25-26; Exh. B). The significance of the ownership of New York and New Jersey shares lies in the fact that each of those states has adopted the Uniform Stock Transfer Act, *under which the stock certificate is in substance the property owned by the stockholder* (Laws of New York, 1913, Chap. 600, Personal Property Law, Art. 6, Secs. 162-185; Laws of New Jersey, 1916, Chap. 191). So far as the New York stock is concerned, it is obvious that the situs of the property is in New York in every sense. Both the corporations and the certificates are here. So far as the New Jersey stock is concerned, under the old rule there might have been a situs for taxation in New Jersey on the theory that that state could control the transfer of the stock by controlling the corporation, but New Jersey by its adoption of the Uniform Act has surrendered that right and the entire transfer must depend on the state where the certificates are located. It may be that the Canadian stock has a situs in Canada for tax purposes based on the old rule, but it is equally certain that so far as the United States are concerned, New York alone con-

trols the transfer and other dealings with the certificates and Connecticut has no power over any of the stock certificates whether they be of New York, New Jersey or Canadian corporations.

Under these circumstances, it is clear that the stock has its situs in New York.

See cases cited *supra*, page 43, and in addition:

Tappan v. *Merchants Bank*, 19 Wall. 490.
Corry v. *Baltimore*, 196 U. S. 466.
Hawley v. *Malden*, 232 U. S. 1.
Baker v. *Baker Eccles Co.*, 242 U. S. 394.
De Ganay v. *Lederer*, 250 U. S. 376.
Disconto Gesellschaft v. *U. S. Steel Corp.*, 267 U. S. 22.
Warrior C. & C. Co. v. *National Bank*, 53 So. 997.
McDougald v. *Lilienthal*, 174 Cal. 698.
Bliss v. *Bliss*, 221 Mass. 201.
Welsh v. *Treasurer*, 223 Mass. 87.
Ewing v. *Warren*, 144 Miss. 233.
People ex rel. Wynn v. *Grifenhagen*, 167 App. Div. 572.
Stern v. *The Queen* (1896), Q. B. 21.
Situs of Corporate Shares, Mich. Law Rev. (Feb., 1927).

3. Other elements in the theory of taxation: Protection; certainty of discovery.

One of the principles often stated as fundamental in the American theory of taxation is that benefit and protection on the one hand and the right of taxation on the

other are co-relative. If the first exists, so does the second; if the first is absent, the second falls.

Tappan v. *Merchants Bank*, 19 Wall. 490.
Corry v. *Baltimore*, 196 U. S. 466.
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194.
Shaw v. *Hartford*, 56 Conn. 351.
Veeder Mfg. Co. v. *Marshall*, 79 Conn. 15.
Bridgeport Projectile Co. v. *Bridgeport*, 92 Conn. 316.
Taylor v. *St. Louis County Court*, 47 Mo. 594.
Matter of Romaine, 127 N. Y. 80.
Redmond v. *Commissioners*, 87 N. C. 122.
Small's Estate, 151 Pa. 1.
Hostetter's Estate, 267 Pa. 193.
Catlin v. *Hull*, 21 Vt. 152.

Aside from the fact that the State of Connecticut extended no protection or benefit to the transfer in this case because that took place under New York law, nor to the property which was transferred because the control of that property was vested in other states, there are certain additional features bearing on these which are peculiar to this case.

This is not the ordinary case of a decedent's estate administered at his domicile by resident executors for resident beneficiaries. It is distinguishable in every feature. The executors are not in Connecticut. The property is not there. The transfer does not take place there. The beneficiaries are not there. The property will never be subject to the direction of the Connecticut court, but will be administered and distributed finally by the New York court. Every element of the usual situation is absent in the present case. Every feature is a distinguishing one and there is no conceivable point along the line of the whole trans-

action where the State of Connecticut has either the physical power to interfere in the transfer nor the opportunity to confer on the executors, the beneficiaries or the property any benefit or protection in return for which it might demand a tax.

We know of only one more argument directed to fact to show why the transfer of intangible property should be subject to a tax at the owner's domicile. This argument is directed to the physical intangibility of the property and is supposed to be equally applicable whether the tax is a general property tax or on the transfer of property.

It is said that since intangible property is by its nature invisible, it is incapable of discovery apart from its owner and if it is not taxed there, it will escape taxation entirely. It was said in the *Union Refrigerator* case, *supra*, as the ground for distinguishing the property there involved from intangibles:

> "Respecting this there is an obvious distinction between tangible and intangible property and the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except perhaps in the case of mortgages or shares of stock. So if the owner be discovered there is no way by which he can be reached by process in a state other than that of his domicile where the collection of the tax otherwise is forced."

Whatever may have been the fact when the *Union Refrigerator* case was decided, it has since been found that intangibles can be discovered away from domicile and can be reached there for taxation. Like many arguments, this one has an air of plausibility, but it is in truth fallacious.

To begin with, it is controverted by the innumerable cases in which intangibles *have* been found and a situs given them.

But to analyze the argument anew, since the property is invisible apart from its owner, it is invisible with him, and if it cannot be discovered by search in the one case, neither can it in the other. As a matter of practical necessity, tax officials depend for its discovery either upon the truthfulness of its owner or upon report from some other sources, and they are as apt to discover the fact of its existence from the debtor as they are from an owner. In fact, the likelihood is greater, as is evidenced by the common provision in the inheritance tax statutes penalizing a corporation or other debtors or holders of intangible property for permitting access, or making transfer of that property, to the decedent's successors until the tax is paid. The self-interest of the owner may persuade him to risk a penalty rather than report such property, while there is no gain to a debtor in concealing property upon which another must pay the tax.

In the second place, a great bulk of these so-called intangible items are clothed with an outward form. Bonds, stock certificates, notes, trade acceptances, of all such this is true. To be sure, they are somewhat easier of concealment than furniture and goods, but as a matter of plain fact, again, it is ridiculous to suppose that the taxability of these tangible pieces depends upon their visibility. No court at this day will suppose that the tax gatherer invades every home and every business to see with his own eyes what is there. He depends upon reports. If he is informed that the report is wrong, he investigates. As a matter of fact we think it is notorious that the taxation of *tangible* personal property belonging to individuals at the present time is not a matter of certainty and appraisal, but rather one of estimate.

So far as the tax collector depends upon information and investigation, such information is as likely to be received and such investigation is as simple under modern

conditions for intangibles as for tangibles. This court will not ignore the fact that the great bulk of intangible property owned by a decedent is represented by securities or other claims which have tangible evidence. The State has many points at which it can safeguard its interests. It can prevent the opening of a safe deposit vault by the decedent's representatives by a penalty imposed upon the safe deposit company. It can prevent the transfer of corporate stocks by penalty imposed upon the corporation. It can prevent the payment of any and every other debt by penalty imposed upon the debtor—subject, of course, to the very significant limitation that it cannot impose these penalties and this control if the debtor or possessor of the securities is outside its jurisdiction, but the sovereign where he is *can* exercise this control. That shows where the property is. And eventually, if the argument of possible concealment and fraud is advanced, the State is driven back to the fact that this concealment and fraud are as possible and much more profitable to the owner than to the debtor.

But the best answer to this fallacious argument of invisibility is to see what is actually done. Let us examine the records of our leading commercial states in this respect; and since in fact these provisions are too many to review in full, let us confine ourselves to those dealing with the taxation of the *transfer* of intangibles by non-residents.

The State of Connecticut itself, by Chapter 190 of the Laws of 1923, in Section 20 imposes taxes upon certain intangibles of a non-resident where the State has control of the debtor. By Section 17, any person who without the consent of the Tax Commissioner pays over any property subject to the succession tax, renders himself liable to three times the amount of the tax, and by Sections 22 and 23, this penal provision is applied to the property of non-residents as against any person in possession or control

thereof. The State of Connecticut seems to have little doubt of its ability to find intangibles or of the method by which their discovery can be facilitated.

The State of New York, by Section 248 of the Tax Law in its present form likewise purports to tax certain intangible property of non-residents. By Section 227, any safe deposit company, trust company, corporation, bank or other institution or person who has possession or control of securities, deposits or any other assets belonging to the decedent, is prohibited from making delivery without notice to the State Comptroller and his consent, and for failure to observe the statute, the corporation or person having such possession or control is made liable for the amount of the tax and interest, together with a penalty of not less than $5,000 nor more than $25,000.

In Massachusetts, Section 8 of Chapter 65 of the General Laws of 1921, as amended, contains the usual penalty clause for the transfer of stock belonging to a non-resident, this apparently being the only non-resident transfer tax.

In Illinois, by Section 9 of the Laws of 1909, page 316, no person in possession or control of "securities, deposits or other assets" of a decedent, whether he was a resident or non-resident, may make delivery without notice to the state officers and their consent, subject to a penalty of the tax plus $1,000.

In Ohio, by Section 5531, intangible property is taxed if the succession is for any purposes subject to or governed by the laws of the state, and by Section 5348 no transfer may be made by any corporation or person having possession, custody or control of property belonging to a decedent without official consent, and penalties are prescribed for violation.

In Pennsylvania, by Section 28 of Act No. 258, Laws of 1919, notice is to be given of a non-resident's property, and by Sections 35 and 36, penalties are provided for the transfer of stock without payment of the tax.

In California, by Section 2 of Chapter 821 of the Laws of 1921, as amended, a tax is imposed on any property belonging to a non-resident within the state. By section 13, no domestic corporation shall transfer stock without official consent, no safe deposit or similar company is permitted to rent a box without an agreement that the lessee shall give notice of the death of anyone who has right of access and then no access is to be given after such death, and no one is permitted to deliver "securities, deposits, assets or property" of a decedent, whether resident or non-resident, without such consent. The penalty is the payment of the tax.

It seems to us that the common experience of modern tax departments is a complete answer to any theory that intangible property is substantially more difficult to reach than tangible property and that therefore it is necessary to permit this taxation at the domicile of the decedent.

4. Summary. The attitude of the courts toward changing conditions and growth of the law.

To summarize as briefly as possible what we have necessarily argued at length, it seems obvious that the real test of Connecticut's right to impose a succession tax on the succession to the property involved in these appeals must depend solely on its jurisdiction of that succession. There are two possible arguments on which to base Connecticut's claim: 1. that the law of Connecticut is necessary to the accomplishment of the succession; 2. that the property has a situs in Connecticut and necessarily the succession is controlled by that state by virtue of the situs.

The Connecticut theory of succession taxes rests solely on the first theory. The Connecticut court appears to concede that the property involved has its situs outside the state. It is therefore driven to reliance solely on the theory that the law of Connecticut played a part in the succession.

This theory is overturned by the decision of this court in the *Frick* case. While the *Frick* case dealt with the transfer of tangible property, there is no ground for distinction in the application of this rule between tangibles and intangibles. The application of New York law to the two classes of property is identical; the inability of Connecticut to affect the transfer of either class is identical.

Turning from the authority of the *Frick* case, it is evident as a matter of fact that the transfer takes place entirely under New York law and that Connecticut is powerless either to aid or interfere. The law of administration under which the transfer is actually accomplished is solely the law of New York. New York will not yield its jurisdiction in any respect. The Surrogate was compelled to take jurisdiction of this property under New York statutes, and having taken jurisdiction, as a matter of discretion he will not surrender it nor direct the property to be sent to Connecticut. The New York rule is the ordinary rule throughout the United States. Neither will New York aid Connecticut in the collection of taxes, and the fact that the executors have gone into the Connecticut courts for an entirely different purpose gives Connecticut no jurisdiction to reach the property or the transfer in New York.

The property involved in these appeals is subject to the jurisdiction of New York for the purpose of administration and transfer. The New York court is actually proceeding with the administration and distribution under its own laws, through its own courts. In every real sense the transfer occurs only in New York, and Connecticut has nothing whatever to do with it. Since the tax is on that transfer it is entirely beyond the jurisdiction of Connecticut.

If, however, any reference to the question of the situs of the property is necessary, it is equally evident that

that situs is exclusively in New York. Situs is not physical location. It is jurisdiction and control. The jurisdiction and control of this property is in New York, not in Connecticut. While the old common law rule was that personal property followed the owner to his domicile and had its legal situs there, an actual situs has been given to property, both tangible and intangible, away from the owner's domicile, determined by this test of jurisdiction and control. The fiction of the common law was based on the maxim *mobilia sequuntur personam*. This maxim arose from medieval conditions. It had a basis in fact and in equity at that time. It was always, however, a rule of convenience and comity, subject to abrogation by the sovereign actually controlling the property. More and more it has given way to the fact of actual situs elsewhere, and this is true for the purposes of administration, attachment and execution, as well as property and transfer taxation.

So far as the law of this court is concerned, it is well settled that tangibles have only one situs, and that the actual situs, for tax purposes. The fiction is discarded but it was not discarded all at once. First the fact and the fiction were recognized together. Then the fact was recognized and the fiction discarded as to property taxation alone. Lastly, after forty years, the fiction was entirely discarded and the fact entirely substituted for transfer taxation as well as property taxation.

The growth of the law of situs of intangibles has followed precisely the same development. First there was an experiment to determine the practicability of allocating an actual situs to intangibles away from the domicile. This growth was slow. It has been completed only in recent years. The fact that intangibles have a situs independent of the domicile has now been recognized. It ought now to be established that the actual situs is exclusive.

Intangibles are not different in this respect from tangibles. There is only one piece of property. There is only one place where it can be controlled. To permit two taxes on the same property on the basis of inconsistent fact and fiction is as much a violation of the due process clause as to permit similar double taxation of tangibles. This fact is recognized and declared by many of the state courts and seems at least in one case to have been adopted by this court.

If there are inconsistent principles expressed in earlier decisions they are explicable by the growth of the law. They spring from a rule based on wholly different conditions. The conditions having changed, the law should change with them. It has changed in a material degree already. It ought to be carried to its logical conclusion.

We cannot forbear referring to certain quotations from Judge Cardozo, Chief Judge of the New York Court of Appeals, in his two books, "*The Nature of the Judicial Process*" and "*The Growth of the Law.*" Many of these statements are, in turn, quotations from other authorities. He says that:

> "'Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction'" ("The Nature of the Judicial Process," p. 96).
>
> "I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation and frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law" (*Id.*, p. 150).

" 'Sooner or later, if the demands of social utility are sufficiently urgent, if the operation of an existing rule is sufficiently productive of hardship or inconvenience, utility will tend to triumph. The view of the legal system as a closed book was never anything but a purely theoretical dogma of the schools. Jurisprudence has never been able in the long run to resist successfully a social or economic need that was strong and just' " ("The Growth of the Law," pp. 117-118).

"A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. * * * If abrogation is permissible in cases of extremity, *still more plainly permissible at all times is continuing adaptation to varying conditions.* This is not usurpation. It is not even innovation. *It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past*" (*Id.*, pp. 136-137).

We need not call the attention of this court to the many expressions in its own decisions and by its own judges in harmony with the foregoing quotations.

The doctrine is peculiarly applicable to the present case. Modern conditions have indicated the desirability and the justification for shaking off once more the "dead hand of the common law," in a situation where conditions have so changed that the reason for the original rule has wholly disappeared and its continued application is directly contrary to fact and wholly unjust.

POINT IV.

The attempt of the State of Connecticut to tax the succession to the property involved in these appeals denies full faith and credit to the public acts, records and judicial proceedings of the State of New York in violation of Article IV, Section I of the Constitution of the United States.

So far as our argument under this point is concerned, it depends, of course, on exactly the same facts and considerations as those urged in Point III. We need not repeat here even in summary the review which we made there of the steps taken in New York to effectuate the transfer of the property involved in these appeals, the New York statutes under which these steps were taken, the New York decisions making them effective or the decisions of other states supporting the New York view, all indicating that the transfer took place entirely without any dependence on the law or the courts of Connecticut or any power in them to interfere with it. Neither need we argue at any length that after the New York Surrogates' Court has completed the administration, distributed the property, set up the trusts, discharged the executors, accepted temporary accountings from the trustees or taken other action, the State of Connecticut must recognize the validity of its judgments and decrees, and the executors, trustees, beneficiaries and other parties are fully protected whether in the Connecticut courts or elsewhere as to their acts and responsibilities in relation to such property. We hardly think that opposing counsel will dispute us on this point, but see

Tilt v. *Kelsey*, 207 U. S. 43;
Harris v. *Balk*, 198 U. S. 215;

Chicago, Rock Island etc. Ry. v. *Sturm*, 174 U. S. 710;
Green v. Van Buskirk, 5 Wall. 307; 7 Wall. 139;
Adams v. *Phelps*, 16 Conn. 127, 133;
Parsons v. *Lyman*, 20 N. Y. 103;
In re Clark's Estate, 37 Wash. 671;

and compare the converse situation in

Baker v. *Baker Eccles Co.*, 242 U. S. 394;
McDougald v. *Lilienthal*, 174 Cal. 698.

Now after all in the present case the State of Connecticut, attempting to levy and collect a tax on the transfer of the property involved in these appeals, just as much denies full faith and credit to New York laws and to the action of the New York Surrogates' Court as if the executors, having sold the Liberty bonds and stock under permission of the New York Surrogates' Court, distributed the proceeds to certain legatees, the Connecticut court held their action invalid and attempted to charge them personally with the responsibility for the action. The Connecticut tax is not on the property which was transferred. It is on succession to the property just as the New York tax is on the transfer of the property. But just as the transfer is accomplished, so is the succession enjoyed by reason of New York law and the New York court. The theory of the Connecticut succession tax and of the Connecticut courts in upholding and applying it is that the transfer and succession depend on Connecticut law. Such was the declaration in the opinion in this case (R. 62-66) and

Hopkins' Appeal, 77 Conn. 644;
Warner v. *Corbin*, 91 Conn. 532, 536;
Gallup's Appeal, 76 Conn. 617, 621;
Bridgeport Trust Company's Appeal, 77 Conn. 657.

Those cases recognize that certain of the property involved had its situs outside the state so that the Connecticut tax in no case rests on the theory of situs, but only on the theory of control of the transfer.

That being so, to assess a tax on the theory that the action of the New York courts under New York law was not effective to accomplish the transfer when in fact and in law it was, is obviously to deny full faith and credit in contravention of Article IV, Section 1 of the Federal Constitution.

We do not think it necessary further to amplify this argument. We believe it no less important than the contention urged in Point III based on the due process clause. But the considerations there urged in Sub-point 1, dealing with jurisdiction of the transfer, are those on which our argument here depends, and it seems hardly necessary to reiterate them simply from a different angle.

POINT V.

The decisions of this court deny the right of the petitioner in No. 190 to appeal from the decision of the Connecticut court.

In our brief in opposition to the petition for a writ of certiorari we argued that under the decisions of this court a state or local officer had no right to review the decision of a state court ruling on the constitutionality of a state statute when he sought that review, not by reason of any personal interest in the outcome, but solely by virtue of his official interest. Since the court has before it on the argument of these appeals all the papers heretofore filed, we see no advantage in repeating the argument then made,

but we again call the court's attention to its decisions in the following cases:

Smith v. *Indiana*, 191 U. S. 138;
Braxton County Court v. *West Virginia*, 208 U. S. 192;
Marshall v. *Dye*, 231 U. S. 250;
Stewart v. *Kansas City*, 239 U. S. 14;
Lampasas v. *Bell*, 180 U. S. 276;

and to the general argument which we made in opposition to the petition (pp. 6-8 of the brief in opposition).

CONCLUSION.

In No. 190 the writ of certiorari should be dismissed, or, in the alternative, the judgment of the Connecticut court should be affirmed. In No. 191 the judgment of the Conecticut court should be reversed.

Dated, New York City, February 11, 1928.

Respectfully submitted,

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Attorneys for the Respondents and Plaintiffs-in-Error.

MAR 19

Supreme Court of the United States

October Term, 1897.

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Supreme Court of the United States

OCTOBER TERM, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, Petitioner, against ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, on Writ of Certiorari to the Superior Court of Fairfield County, State of Connecticut.	No. 190
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, etc., Plaintiffs-in-Error, against WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, in Error to the Superior Court of the State of Connecticut.	No. 191

BRIEF FOR RESPONDENTS-PLAINTIFFS-IN-ERROR, IN REPLY TO PETITIONER-DEFENDANT-IN-ERROR, AND IN ANSWER TO PROPOSED BRIEF FOR NEW YORK TAX COMMISSION AND MASSACHUSETTS TAX COMMISSIONER AS AMICI CURIAE.

The brief for the Tax Commissioner of the State of Connecticut presents certain inconsistencies and fallacies

to which this reply is directed. In other respects we think that we have anticipated his arguments in our main brief.

In addition, this brief is directed to the arguments in the brief prepared on behalf of the Tax Commission of the State of New York and the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, for the filing of which the permission of this court will be sought, counsel for the parties hereto having given their consent to such filing.

1. Whether a federal question is involved.

On the question whether the tangibility of the property involved in No. 190 is solely a matter of state law, the Tax Commissioner confines his argument to two paragraphs on pages 35 and 36. He says rightly that the Connecticut court was not concerned with the interpretation of a Connecticut statute. He ignores the fact, however, that it was concerned with a principle of the Connecticut common law which was as much a matter of local law as the construction of a state statute would be. In the statement that the sole controversy was over the extent of the prohibition of the 14th Amendment, he ignores the fact that, given a decision on the nature of these bonds, the *Frick* case had already answered the federal question. It will be observed that the Connecticut court in its opinion (R. 72-76) carefully classifies all the items of property involved into two lots, tangible and intangible, and places the Liberty Bonds, Treasury Certificates and cash in the first, and the other items in the second class, and then determines the state's right to tax the transfer of the two groups on the principles of the *Frick* case. This classification is emphasized by its subsequent decision in *Lockwood* v. *Blodgett,* 106 Conn. 525, where it holds securities of private corporations and individuals to be intangible under Connecticut law and the transfer thereof accordingly taxable. In other words, despite the Tax Commis-

sioner's denial, the question is precisely in which pigeon hole, "tangible" or "intangible," the Liberty Bonds and Treasury Certificates and cash should be placed. The Tax Commissioner rests his position on the fact that "for eighty years" the State of Connecticut has had the power to tax these bonds. The same statement could be made with equal truth as to a tax on chattels belonging to a resident decedent but located outside the state. It ignores entirely the effect of the *Frick* decision.

It will be noted that the *Red Cross* decision cited by the Tax Commissioner on page 36 in fact favors us. The case turned on the fact that the New York Court of Appeals reached its decision, not as a matter of construction of a state statute or a declaration of state law—*in which event this court would have lacked jurisdiction*—but "because it thought the Federal Constitution required such action." Nothing in the present case indicates that the Connecticut court supposed that the Federal Constitution had any bearing on this decision as to the tangibility of the bonds. The remaining cases cited on page 36 have no application to the present case as long as the Connecticut decision that the bonds were tangible stands.

In the motion on behalf of the New York and Massachusetts tax authorities for leave to file a brief it is stated that the questions at issue in these appeals are not local to the State of Connecticut but bear on the tax policies of every state in the Union. However true that may be of the issues in No. 191, it is not true of the issue of tangibility. The question of tangibility being one of local Connecticut law, it has no effect outside Connecticut and does not obligate the courts of any other state to render a like holding as to the nature of public securities.

Then it is further urged in Point II of their brief that the decision of the Connecticut court on the tangible nature of this property rested, not on the declaration of a rule of Connecticut law, but on a misapplication of federal law and a misunderstanding of California and New York

law. There is no warrant for this argument. The Connecticut court declared Connecticut law (R. 74). It referred to the *Foreign-Held Bonds Case* and *New Orleans* v. *Stempel,* and to California decisions, simply as any court refers to decisions of other courts which it believes to support its own view and which have been persuasive in leading it to reach that view. We disagree with the New York-Massachusetts brief that the Connecticut court did not rightly interpret these decisions, but in any case the decision was clearly an announcement of a Connecticut rule.

We do not see what the law of the State of New York has to do with the case. The question is whether the bonds were tangible property so far as the Connecticut law was concerned. However, counsel seems to have overlooked the New York decisions which we cited on pages 22 and 23 of our main brief.

2. The tangibility of the Liberty Bonds. The form of the Tax Commissioner's argument.

Throughout a large part of his brief, the Tax Commissioner carefully ignores the finding that the Liberty Bonds were tangible and bases his argument on the *assumption* that they are intangible. As a result, there is speciously applied to the Liberty Bonds all of his arguments directed to the intangible property involved in these appeals, without first overturning the Connecticut decision that they were tangible in their nature.

Thus, in his First Point, none of the cases cited which dealt with transfer taxation, except *Sherwood's Estate,* 122 Wash. 648, on page 16, and *Carpenter* v. *Pennsylvania,* 17 How. 456, on page 17, were concerned with public securities, and they have, therefore, no application to the taxation of the Liberty Bonds and cash until the Connecticut finding is upset. Nor are the *Sherwood* and *Car-*

penter cases in point. In the *Sherwood* case there was no claim that the Treasury Certificates involved were tangible, and even had they been held tangible they would have been considered taxable under the old rule, since the *Frick* case had not yet been decided. In the *Carpenter* case it does not appear that the power of Pennsylvania to levy a tax on the public securities was questioned, but objection was made only to the retroactive application of the statute involved.

The whole argument in the First Point is the old one that all of the decedent's personal property passes by the law of the domicile, a principle which is squarely overturned by the *Frick* decision as to tangible property, and hence has no application to the property involved in No. 190 until the Connecticut decision on tangibility is reversed. (Of course, we do not concede the validity of the decisions or the principle as to intangibles; the arguments as to intangibles are refuted in Point III of our main brief and on page 9, *infra*, of this brief.)

Coming to the Second Point, pages 30 to 38 of the Tax Commissioner's brief are devoted to discussion of the Liberty Bonds and cash. His conclusions are again based largely on *assumption* that this property is intangible. So far as argument is directed to the question of tangibility, he says on page 31 that a bond is only evidence of indebtedness, that no amount of dealing or practice can change this, and that recovery can be had without producing the bond. This argument misses the whole point of the Connecticut decision and of our theory. We admit, as the Connecticut court declared, that these securities are, "strictly speaking, mere evidences of debts" (R. 74). But, says the court, such public securities "are treated as a species of *tangible personal property and have come to be recognized as such*" (R. 74). Quoting from decisions of this court, it found that such bonds, because of this course of dealing, have come to be regarded as property

in and of themselves, and that by reason of these considerations they are converted into tangible personal property (R. 75). That is precisely the point of every case cited on this issue in our main brief (pp. 22-23). *Theoretically* such bonds may be evidences of indebtedness but *practically* they are property. The Tax Commissioner's argument that profert is unnecessary offers an excellent illustration of the weakness of the theory as contrasted with the fact. Whatever may be the case with a private bond, he knows perfectly well that no one could hope to collect from the United States Government the value of one of these bonds unless he could produce it—that once the bond is lost or destroyed, it is gone as effectually as a piece of furniture which has been burned.

Then the Tax Commissioner argues on pages 32 and 33 that there is no distinction between public and private securities so far as tangibility is concerned. In determining whether the decision appealed from in No. 190 is sound, we are not concerned if private securities are tangible. Practical considerations in the present day may or may not dictate such a conclusion, but a tendency to find them tangible does not impeach the tangibility of the public securities with which we are concerned. Furthermore, there are substantial considerations which indicate a greater factor of tangibility in the Liberty Bonds. Historically, the attribute of tangibility applied first to public securities and has always been more readily and widely recognized in connection with them. This fact we developed in our main brief at page 23, and it appears from the cases cited just preceding that argument. Practical considerations dictate the same conclusion: a person may recover on a private bond even after it has been lost or destroyed if its validity and ownership can be sufficiently proven, but a recovery on a state or government bond in such a case is practically impossible—and even if the reason for that result is that the debtor is not suable

except by its consent, the result is still that the paper itself is in effect the property and much more than a mere evidence of indebtedness. On pages 25 and 26 the Tax Commissioner has grouped certain states according to their policy in taxing non-residents' securities. It will be noted that the last two groups contain respectively those states which exempt private securities and those which exempt public securities. It will be further noted that while a number of the states listed adopt the same policy as to the two classes, nine states distinguish between them, four exempting private but not public securities, and five exempting public but not private securities. This certainly seems substantial evidence of a distinction between the two classes.

The three reasons stated on page 33 for holding the public security intangible—lack of identity with specific property, the fact that no state can enforce the obligation, and the lack of a local domicile for the debtor—are irrelevant. They confuse control of the debtor and control of the bond itself. If control of the debtor were the test, then the property would be intangible; but it is the fact that the paper is really the property and hence control of the paper is control of the property that forms the basis of tangibility.

Eidman v. *Martinez*, 184 U. S. 578, 581, is cited (p. 35) as a controlling decision of this court, holding that such bonds are intangible. Examination discloses that the case turned on construction of the statute and determination of the Congressional intent, and that the characterization of the property as intangible was simply an introductory descriptive term and had nothing to do with the merits or the decision of the case, nor was it even part of an analytical statement of the law by the court.

Turning on pages 36 and 37 to the cash, the Tax Commissioner does not even deny that it was tangible, but argues that the old rule *mobilia sequuntur personam*

ought to apply to it because it can easily be carried from place to place and secreted. There is nothing in the *Frick* case to indicate that it was confined to chattels. It applies in terms to all tangible property. Its reasoning is equally applicable to all classes of tangibles, and there is nothing to indicate that it turned on inconvenience of transportation or difficulty in hiding the property.

The Tax Commissioner's quotation from the *Union Transit* case on page 32 turns against him. We showed in our main brief (p. 109 *et seq.*) that it was no longer true even as to intangibles that their existence at situs could not be ascertained nor the property reached for taxation, but aside from this it is quite obvious that the argument has no application to bonds or cash, which are just as evident to the senses and no more easily concealed than jewelry, paintings, rare books and similar property.

Some attempt is made on pages 33 and 34 of the Tax Commissioner's brief and in Point II of the brief for New York and Massachusetts to impeach the authorities to which the Connecticut court referred in deciding that the government bonds were tangible in their nature. Neither counsel seems to realize that Connecticut was declaring its own law and simply referred to these cases for their persuasive statement of the considerations which dictated its own decision. The Connecticut court was bound by none of them. Whatever may have been the facts in those cases, the statement of the law and of the practical considerations was apt for the purpose of expressing reasons underlying the Connecticut decision. With the existence of those practical considerations, which opposing counsel do not attack, there is every reason for a court to adopt the rule of tangibility in all aspects of taxation, since a tax system ought to be based on fact and consistent with practical experience and dealings. This argument we have set forth in detail in our main brief (p. 24).

3. Jurisdiction to tax the transfer of the intangible property.

In his first point the Tax Commissioner justifies the Connecticut tax by the old rule that the transfer of all of a decedent's personal property is accomplished by the law of his domicile. This is concededly the theory of the Connecticut tax. We met this issue squarely in the first part of our argument in Point III (pp. 27-59) of our main brief.

That part of his second point which deals with the issues in No. 191, pages 38-47, is partly a repetition of the same theory and partly an attempt to show that Connecticut had jurisdiction to tax the items of property involved as distinguished from the transfer. It is a sufficient answer to this second argument that the tax is on the transfer and not on the property, as the Tax Commissioner himself realizes. This point also is covered by our main brief just referred to.

Turning to specific parts of the argument, the Tax Commissioner cites certain state decisions to support his theory on pages 15-17. It will be observed that all these cases, except *Estate of Zook*, 296 S. W. 778 (p. 16), antedate the *Frick* decision. This court pointed out in the *Frick decision* (268 U. S., at pp. 491 and 493-494) that, so far as reference was made to the domiciliary law, it was by virtue of the law of the state controlling the transfer and was an assertion of jurisdiction by that state. No argument is made and no argument can successfully be made that these statutes asserting jurisdiction over the transfer draw any distinction between tangible and intangible property, or that the domiciliary law is either more or less applicable to the one class of property than the other (see Main Brief, p. 52). Hence the *Frick* decision is a complete answer to these citations. Granted that the *Zook* case is later than the *Frick* decision, it seems plain

that that decision was a misinterpretation of its principles.

On pages 17-20 the Tax Commissioner cites decisions of this court dealing with transfer taxes. We have already distinguished *Carpenter* v. *Pennsylvania* (*supra*, p. 5). In *Keeney* v. *New York* (p. 18) the transfer concededly took place in New York and the only question was whether a tax could be levied on a transfer *inter vivos* but taking effect at death. In the *Rhode Island Hospital Trust Co.* case (p. 19) the language quoted by the Tax Commissioner was unnecessary to the decision of the case, and obviously was general in its application and properly applied to the ordinary case where administration of an estate was had at the domicile.

Bullen v. *Wisconsin* (pp. 18, 19) we distinguished in our main brief (pp. 99-100). That case rested squarely on the old theory that the law of domicile was essential to the accomplishment of the transfer. But we have just shown that the law of the state controlling the transfer makes no distinction in its reference to the law of domicile, whether the property involved is tangible or intangible. The *Frick* case, therefore, has necessarily overturned the principle on which the *Bullen* case was decided.

The Tax Commissioner apparently fails entirely to appreciate the effect of the decision in the *Wachovia Trust Co.* case (p. 20). That decision relies on the principle of the *Frick* case that where the law of the domicile is not involved in accomplishing the transfer, the state of domicile has no jurisdiction to tax the transfer. Dealing as it did with intangible property, it not only reiterates the principles of the *Frick* case, but it answers any contention that those principles were restricted to tangible property. It does away definitely in the case of intangibles with the old theory that the law of domicile was always an essential part of the transfer.

Then, on pages 20-23, the Tax Commissioner cites additional decisions of this court dealing with ad valorem taxation. Those cases are clearly distinguishable because, as we pointed out in our main brief (pp. 87, 91), they all rested on the fact that the tax involved was on the *person* of the owner and reference was made to the property only for the purpose of measuring the tax. Jurisdiction over the property was in no way involved.

Coming on page 23 to the "business situs" cases, the Tax Commissioner refers to the same decisions (p. 86) which we cited in our brief as evidencing one step made by this court along the road to giving an actual situs to intangibles. There is an additional ground of distinction in that they were all property tax cases.

Attempting on page 27 to analyze the nature of the property involved, the Tax Commissioner has fallen into the error of confusing physical location with situs. We need only refer to our analysis of this subject in our main brief, page 62 *et seq.*

Dealing in his second point with the items of property involved in No. 191 (p. 38 *et seq.*), we have already indicated two errors which he makes, first in discussing jurisdiction of the property and not jurisdiction of the transfer, which is the deciding factor, and secondly, confusing situs and physical location. Attempting to rest his contentions on decided authority, his citation of cases dealing with ad valorem taxes is an additional error. We have shown how all those cases are distinguishable, since they depended on jurisdiction of the person and not of the property.

Citing certain cases on the transfer of stock on page 44, he fails to recognize that they turned primarily, not on control of the property as such, but on the assertion of control over the transfer on the old theory. We think it unnecessary to distinguish each of the cases separately. So far as he cites decisions of this court, we have dis-

cussed each of them in our main brief with the exception of *Carpenter* v. *Pennsylvania*, 17 How. 456, and that case we have already distinguished here. As to the state cases, they rest on one of the two principles explained in our main brief, that the law of the domicile controls the transfer or that intangibles have a situs only at the owner's domicile. As to the latter, it may be remembered that this court said in *Eidman* v. *Martinez*, 184 U. S. 578, 589, "*The actual situs of the property in such cases* (succession taxation) *cuts but a small figure* * * *."

4. Double taxation. Public policy. Effect of a decision in our favor.

These questions are presented in two aspects in the briefs of our opponents, the one relating to the tax on this particular estate, and the other the broader question of its effect on taxation and tax policies generally.

To dispose of the narrower question first, the Tax Commissioner suggests throughout his brief that the executors are seeking to escape their just share of the burdens of government, that the New York tax is only minor in amount and that the real problem of the case is not one of "double taxation" but of "escape from taxation" (pp. 7, 38, 43). Answer can briefly be made as follows:

1. In fact only a comparatively small amount of the property involved escapes the New York tax law. The partnership interest and the stock in New York corporations, both taxable under the New York law, were valued at $1,938,341.56, or approximately 80% of the total estate (R. 17).

2. The estate paid the State of New York only $19,166.04 as a tax (R. 18), not because the property as such is exempt, but because the bulk of the estate passed to public, charitable and educational uses.

3. The Connecticut Tax Commissioner can hardly criticize such a policy. Except for the accident of the testator's death during the two years when Chapter 190 of the Laws of 1923 was effective, these gifts for public purposes would have escaped taxation by Connecticut too. Under that law, only gifts to charitable corporations in Connecticut were exempted, but this was contrary to the public policy of Connecticut and the general exemption of all charitable gifts, no matter where the beneficiaries were located, was restored in 1925 (Public Acts of Conn., 1925, Chap. 47).

All taxes levied are by the terms of the will to be paid out of the residuary charitable gift (R. 14, par. 18 of Will).

Turning to the more general phase of this question, the Tax Commissioner has discussed it briefly at page 26. It is the main point, however, of the brief for New York and Massachusetts authorities, and they have drawn a very elaborate picture of the evils of double taxation, the remedy which they advocate of reciprocal statutes permitting the domicile only to levy such a tax, and the results which they believe will follow if our theory is accepted by the court.

We are indebted to the brief of *amici curiae* for their description of the results which have followed from double taxation (which, in fact, of course, has been triple and quadruple at times). No one could paint a darker picture of the results than does their own statement of the situation and their quotation from the report of the committee appointed to study the subject (pp. 8-21). They dispose conclusively of the rather bold suggestion made by the Connecticut Tax Commissioner that the legislative tendency today is away from double taxation.

The object of the committee's study was to do away with the evils of double taxation. To attain this result it urged that in principle intangible property should be taxed only by the state of domicile and that the various states ought to adopt reciprocal statutes exempting non-residents of those states which give a like exemption (pp. 19-20). Of course, such a system, to be effective, must be adopted by substantially all of the states, and having been adopted it is still subject to the weakness that any state can change its mind. On the other hand, if the principles which we urge are recognized, their application becomes universal immediately, without danger of change.

There seem to us substantial additional weaknesses in the reciprocal system. In the first place, experience in the past does not indicate any great willingness on the part of legislatures to forego convenient sources of taxation, whether they are justified in principle or not. The exemption of tangible personalty from direct property taxation came not from legislative action, but as the result of the decision of this court in the *Union Refrigerator* case. The exemption of tangibles from transfer taxation was not due to legislative concurrence in the principle, but to the *Frick* decision. Examples could be multiplied. We see little reason to hope for the conversion of legislatures to the principle of a single tax on intangibles under these reciprocal statutes. We think the only prospect of such a result is a decision of this court enunciating sound principles. Certainly the experience with uniform state laws which have been advocated for a considerable number of subjects over a long period of years is not encouraging. Despite the fact that most of these branches of the law are wholly non-controversial, uniform laws have been adopted only by a minority of the states. How much hope can there be of uniform legislation where the selfish interest of the states is concerned as it is in taxation?

It is urged by the New York-Massachusetts brief that 21 states now adopt the reciprocal principle (p. 22). Examination discloses that only 11 states have adopted the reciprocal provision, and in one of these—New York—the statute has been held unconstitutional. The remaining states either do not at present impose transfer taxes, or they do not tax intangibles of non-residents whether there is reciprocity or not. No one can say how long the policy which dictates this freedom from taxation will continue. It is based on an unsound theory—it gives a return to the state of domicile because that state traditionally has been permitted to collect such a tax, and denies it to the state extending actual protection and control over the transfer, although the fact of this protection and control has just begun to be recognized. As problems of taxation become more pressing, we question whether this solution of the problem will be welcomed by the majority of taxpayers. They are more likely to say that those who benefit by the laws of their states, though non-resident, should bear a just share of that burden, and that those among their residents who benefit from the laws of other states may well pay their share of the expenses of the other state. Under the reciprocal systems, all those who do not benefit are subjected to additional burdens.

The fundamental error in the proposed plan is shown in the report of the committee quoted in the brief. The committee said: "Intangible personal property according to its very nature, has no definite physical *situs* of its own, but the time-honored maxim of the common law that '*mobilia sequuntur personam*,' or 'moveables follow the person,' has given it *an artificial situs* at the domicile of the owner which has long been respected. * * * But the claims of the several states as to the location of intangible property have led to *the anomaly of more than one situs for the same item of property.*" The real anomaly, we should say, would be to return to a system which con-

cededly is based on an artificial situs and a disregard of actuality and fact.

Since the evils of double taxation may be corrected without awaiting legislative conversion or depending on the continuance of that conversion, by a determination that a transfer of intangible propery having an actual situs is taxable there only, and since a system based on that determination has the advantage that it is in accord with the fact, what practical objections can be made to it?

It is said in answer that a decision in our favor will enable estates to escape taxation entirely, will result in the substantial breakdown of the tax systems of the states, and has against it every consideration of history and policy. Without repeating the analysis made (pp. 23-26), the picture drawn is a very dark one. It is all the darker because it is insisted that such a decision on transfer taxation will necessarily invalidate general property taxes directed to intangibles (pp. 3, 29).

At the outset, we may well dispose of the contention that a decision in our favor will disrupt the tax systems of the states because it necessarily invalidates any tax intended to reach intangibles similarly situated during the owner's lifetime. It will do nothing of the kind. It is true that if these intangibles are located beyond the jurisdiction of the state of domicile they cannot be reached by direct taxation, but this court has held repeatedly that a personal tax can be levied on the owner measured by the total value of his personal property wherever situated (cases cited, Main Brief, p. 91, and also *Kirtland* v. *Hotchkiss,* 100 U. S. 491). A decision here is certainly no reversal of those cases. The test in transfer tax cases is jurisdiction of the transfer. The test in personal tax cases is jurisdiction of the person. And indeed a decision here on jurisdiction of the transfer is not even a decision on the situs of, and consequent jurisdiction to tax, the

property itself, so that the question even of direct property taxation is still open.

There is, therefore, removed from the analysis at the outset the spectre of total disruption of existing tax systems. We think the picture sketched of the effect on transfer taxation is equally overdrawn.

We suppose our opponents will agree with us on two elementary propositions: first, that the exemption of property from taxation by a state which has jurisdiction to levy a tax creates no right to levy a tax in a state which otherwise would lack jurisdiction; and secondly, that an objection based on the due process clause of the Constitution is not answered by pleas of inconvenience or loss of revenue.

Perhaps we may call the court's attention here to the relative importance of transfer and other taxes in the revenue systems of the states. The brief for New York and Massachusetts having just been served upon us, we have not had the opportunity to secure statistics to show how comparatively small a part of the revenue of our states is realized from death taxes, but we think our opponents will hardly challenge the statement that they occupy a relatively unimportant place. Even if it were true that transfer taxation were entirely done away with, it would not follow that a major part of the state revenue had to be replaced from some new source.

Counsel for both Connecticut and New York and Massachusetts urge—the latter in much greater detail—that wholesale evasions of transfer taxation would result, and, indeed, suggest that transfer taxes would have to be done away with, and urge the inequity of such a result to the states. The basis of their contention is the assumption that certain states would levy no transfer tax on such intangibles and would thereby encourage the residents of other states to locate their intangible property within the borders of the non-taxing states.

It is unfair and misleading to apply the term "evasion" to a proper investment in a state other than that of the investor's domicile. We should suppose that as a matter of course, if the location of property away from the owner's domicile were made for the purpose of tax evasion in the strict sense—in other words, if there was no *bona fide* purpose—the principles which we urge would not protect the taxpayer. The burden might well be placed on the taxpayer to show that the location of his property away from domicile was made in good faith and not for the purpose of evading taxation, just as the burden now rests on him in most states to show that a transfer made within a certain time before the decedent's death was not made in contemplation of death. Deliberate evasion never gives a basis of constitutional right, but the possibility of evasion is no reason for denying constitutional rights to parties who act in good faith.

A man has always been able to escape taxation by the state of his domicile on such part of his wealth as he chose to invest in real property located in a state which did not levy a transfer tax. The wealthy investor in real estate who chooses to put $5,000,000 in a real estate development in Florida is free from any transfer tax on that amount at his death. We do not know that the inequity of such a result has ever appalled anyone. In fact, it has been accepted as quite a normal result.

If we are not mistaken, when the *Frick* case was pending before this court other states than Pennsylvania were concerned with the prospective result of a decision in that case on much the same grounds. It so happened that Mr. Frick's art collection and his extensive personal property were located in two states which levied transfer taxes on them—although in New York they escaped because of the benevolent gift—but under the principle of the *Frick* case a man in his position might choose Washington instead of New York for the center of his art collection, and might

elect to have his country estate in Florida instead of Massachusetts, and his tangible personal property would thereby be freed from any burden of transfer taxation. This result was perfectly obvious when the *Frick* case was decided. Yet it presented no bar to the declaration of sound rules of law.

Why is a man who invests his wealth in intangible property outside the jurisdiction of his domicile in a different position? Why is he the more obligated to pay taxes on that investment than on an investment in tangibles outside the state? If a resident of New York owns outright a manufacturing business in Pennsylvania he is concededly not liable to a tax on the transfer of the buildings and machinery at his death. Why should he become liable by reason of incorporating the company so that his ownership is represented by stock? What greater obligation does he owe to the state of his domicile in the one case than in the other?

In one aspect it would be to an owner's interest to locate his intangibles in a state which levies no inheritance tax, but in practice we should probably have precisely the situation which now exists where considerations of business convenience and expediency are balanced against the burden of taxation. For example, until 1926 stock in a New Jersey corporation owned by a non-resident was subjected to a very heavy transfer tax by that state. Yet it is common knowledge that many of the greatest aggregations of capital in the country were incorporated there, and so subjected their stockholders to that taxation, although they could have sought incorporation in Delaware and avoided the burden. The real result—and we think it a very beneficial one—will be to make the states give some thought to the rates of their inheritance taxes. If they insist on following the policy which has been in vogue in some of the states recently, and in the guise of inheritance

taxation confiscate a material part of the capital of their wealthy citizens, they will undoubtedly find themselves driving that wealth outside their borders. If, on the other hand, they adopt a policy of reason and moderation, very few business men will give up the convenience and efficiency of having their property at hand and subject to their control, to save a moderate and reasonable tax payable only in the event of death. The situation instanced in New York is an excellent illustration. Here we have the most active market for securities in the country and the money center of the world. Business cannot afford to divert its intangible capital from New York. It may indeed be driven from New York by grasping taxation, but this taxation must be so high as to rest an unconscionable burden on the commerce of the country, and if the state follows that policy it deserves to lose both its revenue and its importance as a money center.

Neither is it the fact that if death taxation were limited there has been destroyed any source of taxation. After all, any tax ultimately rests on underlying physical property. All that is accomplished by death taxes on intangible property is to make taxation slightly more palatable by dividing it into two parts, one a direct tax on the underlying property, and one a transfer tax on the securities representing that property. If a resident owns the bonds of a domestic corporation, it is obvious that in the price paid for the bonds or the return received from them the element of prospective transfer taxation is considered. If freedom from taxation of the transfer of those bonds is assured, the cost of the loan to the corporation is reduced by so much and an equal increase in the direct tax on the corporate property will have laid no additional burden on it. As a matter of fact, the total burden on the potential taxpayers may be substantially less, because where two taxes are collected there must be included a double overhead for collection and the taxpayer must also figure on the cost of two tax returns to him. The brief for *amici*

curiae has pointed out (pp. 13-18) the unconscionable cost of transfer tax returns to the taxpayer. The drawback from the view of the tax authorities of a given state to this scheme is that a single direct tax on property looks much larger and causes much more protest than two taxes on two different forms of the property, even though the single tax be smaller than the aggregate of the two. But it does not follow that the result is undesirable. The mounting cost of municipal and state government has been facilitated by the ability of tax officials to diversify the form of the various levies so that no one burden seems unbearable.

Similarly, suppose a man does form a holding corporation in a state where no transfer taxes are levied, to take over the stock of a corporation organized in a state which does levy such taxes. We have precisely the same situation as that just described. The stock may escape taxation; the underlying property of the corporation is still available and the stockholder is compensated for an increased tax on that underlying property by his freedom from a transfer tax. Again, of course, the tax authorities must use a little discretion as to the amount of the direct property tax.

In conclusion, we call attention to another error which the Tax Commissioner makes in his brief. He lists 35 states which exempt foreign corporate stock belonging to non-residents from transfer taxation though the certificates are in the state at the time of death (p. 25). He has failed to observe that these certificates are subject to *double* taxation, by the state of domicile and by the state of incorporation, and that all these statutes do is to free them from *triple* taxation.

5. The due process point.

We think the argument in our main brief, Point IV, pages 118-120, fully covers the Tax Commissioner's Third Point (p. 48), dealing with the question of full faith and credit. The decisions which he cites on page 49 are either distinguishable or consistent with our argument.

Dated, New York City, March 9, 1928.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OF AMERICA

OCTOBER TERM, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut,
Petitioner,
vs.
ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors,
on Writ of Certiorari to the Superior Court of Fairfield County, State of Connecticut.

No. 190

ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, etc.,
Plaintiffs-in-Error,
vs.
WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, in Error to the Superior Court of the State of Connecticut.

No. 191

BRIEF ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK AND THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICI CURIAE.

SETH T. COLE, ESQ.,
Counsel for Amici Curiæ.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

OF AMERICA.

October Term, 1927.

WILLIAM H. BLODGETT, Tax Commissioner of the State of Connecticut, *Petitioner*, vs. ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, on Writ of Certiorari to the Superior Court of Fairfield County, State of Connecticut.	No. 190
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BRIEF ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK AND THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICI CURIAE.

Statement.

Two questions before the court are to be discussed in this brief, viz.:

(1) May the State of Connecticut in which the decedent, Robert B. Hirsch, was domiciled at the time of his death, impose its inheritance tax upon certain intangible personal property owned by the decedent at the time of his death consisting of the following items:

(a) An interest as a general partner in a limited partnership organized under the laws of the State of New York and having its principal place of business in the City of New York, the surviving members of the partnership being residents of the State of New York;

(b) United States Liberty Bonds which were physically within the State of New York;

(c) United States treasury certificates which were physically within the State of New York;

(d) Shares of stock of corporations organized under the laws of states other than Connecticut, including New York corporations, and of Canada, the certificates of which were physically within the State of New York;

(e) A deposit in a savings bank of the State of New York;

(f) The proceeds of an insurance policy on the life of the decedent issued by a New York insurance company, the policy being physically within the State of New York and the proceeds being payable to the executors;

(g) Coins and bank notes physically within the State of New York;

(h) Bonds of Connecticut corporations physically within the State of New York?

The will of the decedent was first admitted to probate in the State of New York and was thereafter probated in the State of Connecticut and letters testamentary were

granted to the executors in both states. The executors are all non-residents of the State of Connecticut.

(2) Assuming that the answer to the first question is in the affirmative, are the United States bonds and treasury certificates described in (b) and (c) above to be considered tangible personal property having an actual *situs* without the State of Connecticut and for that reason not subject to an inheritance tax in said state under the doctrine of *Frick vs. Pennsylvania,* 268 U. S. 473?

The first question constitutes the major issue and the second question the minor issue. If the major question be answered in the negative it becomes unnecessary to consider the minor question but if the major question be answered affirmatively, the minor question must also be answered.

A negative answer to either question will produce the utmost confusion in the administration of the death tax laws of the various states. Should the major question be answered in the negative, it is believed the result would be not only to make it practically impossible for any state to impose a death tax on other than tangible property, regardless of the domicile of the decedent, but, furthermore, such a decision would of necessity seem to require a reversal of the rule that a general property tax may be imposed by the state of domicile of a person upon intangible personal property owned by him.

It is, therefore, not an exaggeration to state that these questions are the most important the court has ever been called upon to consider so far as they relate to the right of the states to impose death taxes.

ARGUMENT.

POINT I.

There are no considerations of economy or public policy which should persuade the court to discard the mobilia sequuntur personam maxim and change its former decisions holding that the state of domicile of a decedent may subject all of his intangible personal property to death taxes.

For the purpose of the argument under this point, it will be assumed but, of course, not conceded, that the executors are right in their contention that administration of the intangible personal property of this decedent, other than shares of stock in Connecticut corporations and the debt due from a resident of Connecticut, may be had in Surrogates' Court of the County of New York, State of New York, and that such property may be distributed pursuant to the authority and under the jurisdiction of that court without regard to the Probate Court for the District of Stamford, State of Connecticut, and without regard to the laws of the State of Connecticut except insofar as the laws of that state may be adopted by the State of New York on grounds of comity for the purpose of effecting distribution. In other words, it will be assumed that the right of Connecticut to levy a death tax upon said intangible personal property is based solely upon the fact that the decedent was domiciled in that state at the time of his death.

Counsel will refrain from a discussion of the cases decided by this court which hold that the state of domicile of a decedent may tax his intangible personal property on the *mobilia sequuntur personam* theory, inasmuch as these

cases are cited and discussed in the able brief of counsel for the petitioner and defendant-in-error. Said brief establishes that it is now the rule of this court that the state of domicile of a decedent may exact a death tax upon all intangible personal property owned by him at the time of his death, regardless of the nature of the property, the residence of the debtor, the place where evidences of indebtedness may be kept, the jurisdiction of incorporation of companies in which the decedent was a shareholder or the physical location of the share certificates.

We are, therefore, confronted with a situation which requires that this court adhere to its former decisions and answer at least the major question in the affirmative, or else that it discredit the *mobilia sequuntur personam* maxim in its application to death taxation of intangible personalty and lay down a new rule of law taking away from the state of domicile the right to tax intangible personalty which may be so situated that it may be subject to administration and distribution under the laws of another jurisdiction.

Let us then consider the reasons which should influence the court in reaching a conclusion, looking at the questions from the broad standpoint of economy and public policy. In doing this, the argument under this point will be directed toward the development of a background for the legal picture that will be exhibited to the court by the briefs of counsel for the parties to the issue.

It is respectfully submitted that death taxes have their proper place in any system of taxation and that it should be possible to reach all property owned by a person at the time of his death in order to lay a death tax thereon. Under the existing law, this may be done by the states but

will be impossible if the executors are successful in their argument. Death taxation is one of the oldest forms of raising public revenues and death taxes are imposed by most sovereignties throughout the civilized world. In the United States, the federal government and forty-five of the forty-eight states levy death taxes, as do the territories of the United States and certain of its possessions.

What reason is there, if any, why the state of domicile of a decedent should be denied the right to tax any portion of his intangible personal property? Undoubtedly, the principal argument to be advanced against such right is that under certain conditions other states may also levy a death tax, resulting in double or multiple taxation. At first glance, this may seem to be a compelling reason, but upon more careful examination, it will be seen that the argument does not carry a great deal of force. To begin with, if the state of domicile is denied the right to tax, it does not follow that double or multiple taxation will be avoided. The federal estate tax insures a double tax in every estate the value of which exceeds the exemption allowed by the Revenue Act. The shares of stock owned by this decedent in corporations organized under the laws of the State of New Jersey might have been subjected to a tax in New Jersey where the shares have a *situs*, and another state might tax if the shares happened to constitute capital employed in business there. Indeed, some states have asserted the right to levy a tax upon corporate shares merely because the corporation maintains a transfer office within their borders, although the corporation may be foreign and the decedent a non-resident.

Notes and bonds of corporations (including states and municipalities) and individuals may be taxed where the

same are physically located at the time of the owner's death, although not located within the state of domicile, and may also be taxed by another state as capital invested in business by the decedent. Sometimes corporate notes and bonds are additionally subjected to tax by the state of domicile of the corporation, particularly if they are in registered form.

Still another example of multiple taxation would be in the case of the shares of a corporation incorporated in more than one state. A California decedent who died owning shares of stock in the New York Central Railroad Company, even if not subject to tax thereon in California, would still be subject to the taxes of the six states in which the railroad company is incorporated and might also be taxable in other states as indicated above.

A co-partnership interest might be taxed in several states because of the business being conducted in each of said states, and none of these the state of domicile of the decedent.

Clearly, denial of the right of the state of domicile to tax intangible personalty according to the *mobilia sequuntur personam* theory would not eliminate multiple taxes, and other good grounds for the denial of such right from the standpoint of economy and public policy seems lacking.

It remains to consider the reasons why the right of taxation of all of a decedent's intangible personal property by the state of domicile should be retained. In discussing this feature of the case, it becomes necessary to review the history of events which have transpired in the past four or five years and which were designed to correct many of the

evils which had sprung up in connection with death tax laws, and especially the multiple tax evil.

In the year 1924 the people of the United States had become thoroughly aroused over the inequities of death taxation. This was the culmination of a storm which had been brewing for many years. Property included in estates was being subjected to death taxation by many jurisdictions; in fact, by almost every jurisdiction which could find any pretext on which to base the claim of a right to impose a tax. Multiple death taxation was not only evil of itself, but other evils followed in its train. Proceedings to have the tax assessed were required in many jurisdictions, resulting in expense and delay. Some states seemed to consider the non-resident estate to be legitimate prey and enacted laws which made it essential that local counsel should be employed in death tax proceedings. In any event, it was necessary to file returns with each state which imposed a tax and these returns were wholly lacking in uniformity, as were the taxing laws of the states. Most states which asserted a tax refused to permit the transfer of the property until returns had been made and the tax ascertained and paid. This often resulted in substantial losses because it prevented the prompt sale of securities in a favorable market. Articles appeared in many of the national magazines condemning the prevailing practices and the newspapers took up the subject seriously.

See

Atlantic, v. 133, pp. 290-7, March, 1924.

Princeton, 1924.

Saturday Evening Post, v. 196, pp. 14-15, Feb. 16, 1924.

pp. 14-15, March 8, 1924.
v. 197, p. 25, January 3, 1925.
v. 198, p. 23, July 4, 1925.
Economic World, n.s., v. 26, pp. 53-4, July 14, 1923.
v. 27, pp. 305-6, March 1, 1924.
v. 29, p. 233, February 14, 1925.
Trust Companies, v. 36, pp. 749-51, June, 1923
v. 37, pp. 379-81, October, 1923.
American Bankers Association Journal, v. 17, pp. 118-9, August, 1924.
Literary Digest, v. 84, p. 11, March 7, 1925.
National Income Tax Magazine, v. 2, pp. 133-4, May, 1924.
Annalist, v. 25, p. 223, February 9, 1925.

The foregoing citations are taken somewhat at random; they could be greatly increased.

Quite logically, the agitation led to a consideration of remedies. The President of the National Tax Association issued a call for a conference to be held at St. Louis in September, 1924, to which the governors of the states sent delegates. The subject was analyzed and discussed at this conference, and at the conference under the auspices of the National Tax Association held at the same time, and resulted in the adoption by the latter conference of a resolution requesting the National Tax Association to endeavor to bring about a conference of representatives of the state and federal governments to further consider the matter and to seek a remedy. The resolution read in part:

> "In the opinion of this conference, the time has arrived for the several states to take counsel among themselves and with the Federal Government, with respect to the problems of inheritance and estate taxation, to the end that existing evils may be corrected."

(See proceedings of Conference on Inheritance and Estate Taxation printed as appendix to the proceedings of the 17th annual Conference on Taxation under the auspices of the National Tax Association; also proceedings of the latter conference, pp. 446-7.)

The conference suggested by the resolution was held at Washington, D. C., on February 19-20, 1925, and was attended by delegates appointed by the governors of twenty-five states. Delegates were also present representing the District of Columbia. Eight other states were represented by unofficial delegates. The government of the United States was represented by the Secretary of the Treasury and by President Coolidge, who addressed the conference. (See Proceedings of the Conference.)

President Coolidge said in part:

"There is competition between states to reach in inheritance taxes not only the property of its own citizens, but the property of the citizens of other states which by any construction can be brought within the grasp of the taxgatherer. A share of stock represents a most conspicuous example of multiple inheritance taxation. It is possible that the same share of stock, upon the death of its owner, may be subject to taxation, first, by the Federal Government; then by the state where its owner was domiciled; then by some other state which may also claim him as a citizen; again in the state where the certificate of stock was kept; in the state where the certificate of stock must be transferred on the corporation's books; in the state or states where is organized the corporation whose capital stock is involved; and, finally, in the state or states where this corporation owns property. All this means not only an actual amount of tax which may under particular circumstances exceed 100 per cent of the value of the stock, but the expense, delay and inconvenience of getting clearances of the states who claim a right to tax the property is a serious burden to the heir who is to

receive the stock. Particularly is this expense disproportionate to a tax paid by a small estate which has but a few shares of stock. In many cases the expense alone must exceed the total value of the shares which it is sought to transfer. Looking at it from the standpoint of state revenue, I am told it is probable that the full cost to executors of ascertaining the tax and obtaining the necessary transfers is in the aggregate nearly as much as the tax received by the states upon this property of non-resident decedents. Here, indeed, is extravagance in taxation.

"A solution of this problem presents the difficulty of obtaining reciprocal action on the part of the states. I feel, however, that in fairness to each other and to their taxpayers, some way will be found of obviating this extravagance, by giving up entirely the collection of taxes upon personal property of non-resident decedents, or by the imposition upon the transfer of such property of a tax extremely simple in administration and low in amount." (Proceedings, pp. 8-9.)

The conference adopted a resolution for the appointment of a committee to review the death tax situation and to call a second national conference for the purpose of submitting its report. The committee appointed pursuant to said resolution consisted of three representative business men, three economists and three tax administrators, and was so selected as to give representation to each part of the United States. The committee submitted its report to the Second National Conference on Estate and Inheritance Taxation, held at New Orleans, Louisiana, on November 10, 1925. Extracts from the report of said committee dealing with the problem now under discussion follow:

"Multiple Taxation of the Same Property by States Should be Abandoned. Conflicting view of the *situs* of property for taxation have led to abuses by the states which have become almost insufferable. In the early days of the inheritance tax a state was content to tax the real property located within its borders and the personal property of decedents who were resi-

dents of the state at the time of death. Within the last few years, however, most of the states, in addition to taxing all of the personal property of its resident decedents, have adopted laws whereby intangible personal property belonging to non-resident decedents is regarded as having a *situs* for the purposes of taxation within the state under certain circumstances. By thus establishing more than one tax *situs*, such laws have necessarily brought about duplicate and multiple taxation of the same property.

"The *situs* of real estate for the purpose of taxation has always been regarded as fixed under the law and it is well settled by the Supreme Court of the United States that it can be taxed only where it is physically located. Therefore, no attempt has been made by any state to tax real estate located beyond its borders, with the exception of two or three states, which by a construction of the doctrine of equitable conversion have attempted to tax such property under some circumstances. Elsewhere real estate, therefore, does not suffer the injustice of being taxed by more than one state.

"Whatever doubt may have existed with reference to the taxation of tangible personal property was definitely settled by the Supreme Court of the United States in an opinion announced on June 1, 1925, in the cases of Frick vs. The Commonwealth of Pennsylvania. The court held that the only *situs* for the taxation of tangible personal property was the state in which it is physically located and that the state of domicile has no power to tax tangible personal property located beyond its borders. This decision, therefore, eliminates the possibility of taxation of such property by more than one state in the future.

"Intangible personal property according to its very nature, has no definite physical *situs* of its own, but the time honored maxim of the common law '*mobilia sequuntur personam,*' or 'movables follow the person' has given it an artificial *situs* at the domicile of the owner which has long been respected. Every state, therefore, which has an inheritance tax law undertakes to tax all of the intangible property of its resident decedents. The great majority of them, however, in addition undertake to impose a tax on intangible prop-

erty belonging to non-resident decedents when such property is located in the state. But the claims of the several states as to the location of intangible property have led to the anomaly of more than one *situs* for the same item of property. For example, thirty-six states impose a tax upon the stock of corporations chartered by them although the stock is owned by a non-resident decedent. Eleven states attempt to impose a tax upon the transfer of stock owned by a non-resident decedent if the corporation has property within its borders even though it be incorporated in another state. This provision has been declared unconstitutional by the highest court in several of the states. The Supreme Court of North Carolina, however, upheld the tax in a case which is now pending in the United States Supreme Court. Sixteen states attempt to tax the stock owned by a non-resident decedent even though the corporation be a foreign corporation, if the certificate of stock happens to be physically located in the state at the time of death.

"If, therefore, a resident of Wisconsin should die owning stock of a New Jersey corporation and the certificate of stock happened to be deposited in a safety deposit vault in Missouri, and the corporation owned property in North Carolina, before the property could be transferred by the executor it would be necessary for him to pay inheritance taxes on the stock to the State of Wisconsin, the State of New Jersey, the State of Missouri and the State of North Carolina. In addition, if the estate is over $50,000, he must pay a tax to the Federal Government. If the stock happened to be that of a company also incorporated in states other than those enumerated, such other states would have to be added to the list. Some railroads are incorporated in five or six states, and the shares of stock are taxable in each upon the death of the owner. The situation as to bonds, notes and other obligations is equally deplorable, as will appear from the accompanying chart showing the personal property of non-resident decedents subject to tax in the various states.

"Theoretically, at least, these taxes might amount to more than 100 per cent, and actually the multiple burdens do work great hardships upon estates. Information collected by this committee shows that these

burdens are not limited to large estates. A resident of New Jersey whose gross estate was only $49,000 was recently required to pay an aggregate tax of $7,112.56, or 15 per cent of the gross estate to three states. A gross estate of $8,458.10 in Kentucky was required to pay inheritance taxes aggregating $634.75, or approximately 8 per cent to three states. An estate of only $2,000 in Arkansas was required to pay a tax of approximately $50 to another state.

"In fact, it is very probable that small and moderate estates suffer far more in proportion from these conditions than the large estates. The owners of large estates usually employ competent advisors, and by various devices, such, for example, as shifting investments or organizing holding corporations, escape the burdens to a considerable extent. The owners of small and moderate estates, on the other hand, seldom realize the need of expert advice in such matters, and their estates are frequently called upon to pay taxes which could have been avoided by a manipulation of investments prior to death.

"Moreover, these conditions penalize such a diversification of investments as might be sought either for the promotion of safety or for increasing the productiveness of capital. In this regard also the small or moderate estate is apt to suffer more in proportion to size than does the large estate.

"Excessive taxes, however, are not the only burden growing out of the multiple claims in regard to the *situs* of property. The inconvenience, delay and economic waste in the settlement of estates, which necessarily result, are often more oppressive than the taxes imposed. In order to determine whether taxes are chargeable, the laws of each state require the executor to secure a waiver before transferring any property coming within the provisions of its laws. To secure these waivers it becomes necessary for the executor to prepare the necessary forms and such other papers as the law of the particular state may require. The preparation of such papers involves expense even though frequently, because of the exemptions and deductions allowed, no taxes whatever are payable. These forms are by no means similar in the various states, and it is often necessary to prepare a number of different sets for a single estate.

"For one estate in New York formal requirements in the nature of inheritance-tax proceedings were required in twenty-two states and one foreign government, although prior to the decedent's death his attorneys and bankers had examined his securities and made many sales for the express purpose of avoiding multiple proceedings. Had this precaution not been taken, proceedings would have been necessary in nearly forty states. For a recent Pennsylvania estate such proceedings were necessary in twenty-two different states, the Province of Ontario and the Federal Government. Numerous instances have been found by the committee which show such proceedings in from ten to twenty states. In fact, records of the trust companies indicate that for settling the average estate such proceedings are required in no less than six or eight states. Nor is this situation confined to the large estates, as will appear from the following specific cases reported to the committee:

Value of Estate	Number of states in which proceedings necessary
$ 20,000.00	12
23,386.33	9
27,000.00	9
27,500.00	13
28,000.00	9
32,761.52	6
33,584.86	11
103,000.00	17

"The time required to obtain the necessary waivers ranges from several days in some of the states to many months in others. In most of the states an inventory of the entire estate is required. No proceedings can be commenced, therefore, until after the estate has been appraised. Because of the many serious delays, the Corporate Fiduciaries Association of New York City appointed a committee to attempt to work out a uniform method in obtaining waivers to expedite the transfer of securities of decedents whose estates were administered by members of the association. The committee wrote to each of the states inquiring whether the state would agree to issue waivers consenting to the immediate transfer of such securities

upon receipt of a cash deposit sufficient to cover the amount of the largest possible estimated tax. As indicative of the time taken to secure a waiver which should not require more than a few days at the most, and also as indicative of the lack of official appreciation of the importance of the time element in such transactions, the reply of one state official may be quoted: 'The entire proceeding (of securing waivers) in no event requires more than a month to complete, which is, as we are advised, quite extraordinary considering the delay occasioned in most other jurisdictions. For this reason we do not believe that it would be of any practical advantage in most cases that a cash deposit be forwarded before the tax is computed.'

"As the securities cannot be transferred until the tax waiver has been secured from each state which may claim a tax, executors are frequently prevented from taking advantage of a favorable market in the sale of the securities. These delays, therefore, are more than exasperating in that they frequently cause a material shrinkage in the assets of the estate. A few examples will illustrate the serious loss from this cause.

"In a recent Pennsylvania estate, inventoried at $53,000, tax proceedings were required in thirteen states other than the state of domicile, and more than six months elapsed between the death of the decedent and the receipt of the necessary waivers to execute the transfer. During this period of waiting there was a shrinkage in the value of the assets of the estate of about $8,500. The taxes on this estate amounted to $6,079.77, which together with the shrinkage caused by the tax proceedings, consumed approximately 30 per cent of the estate.

"In a California estate one item of stock alone declined in value $5,400 before tax waivers could be procured and a sale consummated.

"In a New York estate, after filing application for a waiver with another state from which it is comparatively easy to obtain waivers, the executors had an opportunity to sell the stock for immediate delivery for $44,000; by the time the waivers were received the offer had been withdrawn and the market had dropped to $38,000, a difference of $6,000.

"In another New York case stocks in a Delaware corporation which had property in Arizona were inventoried at $3,471.98; nearly three months were consumed in obtaining a waiver. In the meantime the market had dropped drastically and the total proceeds from the sale of the stock was only $63.65.

"These non-resident taxes also involve a tremendous economic waste. In a large percentage of the cases no tax whatever is due, although the filing of all of the necessary papers is required, and frequently the costs incident to the proceedings are far in excess of the tax. Ten states require court proceedings and in several it is necessary to employ a local attorney to conduct the proceedings. One state, until recently, required an ancillary administration and frequently the public administrator received a fee greater than the tax received by the state.

"The following specific cases are sufficient to illustrate the indefensible effects of these practices:

"In one New York estate containing securities of corporations of another state, with a par value of $25,500, inventoried as of the date of death at $6,912.50, and finally sold for $8,166.05, it was necessary to have this portion of the estate administered locally in the other state. The local administrator's fee and other expenses of the local administration amounted to $1,012.46, although the taxes paid to the state amounted only to $320.12. The total tax and costs, therefore, in that state alone took 16.31 per cent of the proceeds from the sale of the securities.

"An estate of $150,000 in the District of Columbia occupied almost the entire time of one person for three months to secure the necessary waivers and consents to the transfer of securities. The tax in one state on securities, which were valued at approximately $3,000, was $18. The cost of the tax proceedings in that state, however, was $230.

"In a Maryland estate six months and three days were required to secure the necessary consent to transfer the stock of one railroad. The cost of proceedings amounted to $65, although no tax was payable.

"In an Illinois estate the cost in connection with the determination of inheritance taxes in another state, amounting to $16.20, were $33.60; in a second Illinois

estate the cost of court proceedings in another state was $46.50 to determine a tax of $34.36; in a third Illinois estate the expenses in connection with the determination of a tax of $709.00 to another state were $204.50.

"In a New York estate the total tax in nine of the states in which waivers were required was 66 cents; the estimated cost of proceedings in obtaining these waivers was $250; in another the total tax paid to four states was $62.72, the estimated cost of proceedings, $125.00; in a third the total tax paid to six states was $259.31, the estimated cost of proceedings $175.00; in a fourth the total tax paid to ten states was $827.37, the estimated cost of proceedings $500.00.

"In a recent estate, in order to transfer stock of a railroad company which was incorporated in Maryland and Pennsylvania and maintained a transfer office in New York, although the market value of the stock was not more than $100 and the tax liability considerably less than a dollar, it was necessary to prepare and file three copies of the will, two of which had to be certified, three certified copies of the letters testamentary; two applications under oath for appraisal; six schedules setting forth assets and liabilities; a copy of the petition for letters; a copy of the executor's bond; an order of court; a resolution of the board of directors of the corporate executor; evidence of payment of the transfer taxes; an affidavit of no indebtedness in Pennsylvania; a Pennsylvania short certificate; a New York inheritance tax waiver, and a Pennsylvania inheritance tax waiver. When the costs and the time and labor of the executor are considered, it is exceedingly doubtful whether the value of the stock justified the trouble and expense of transfer.

"In a Kentucky estate, in order to transfer twelve shares of stock of a corporation chartered in another state, the market value of which was $10 per share, or $120, it was necessary to furnish certified copies of the will, settlements and inventories at a cost of $10 and to write thirty letters. A tax of $15 was assessed on the property, which, together with the cost, amounted to 21 per cent of the value of the property, which is now worthless.

"These unconscionable abuses are sufficient in themselves to bring condemnation upon the entire inheritance-tax system and are a reflection upon the intelligence and common sense of the American people. Any attempted solution of inheritance-tax problems, therefore, which does not eliminate the evils of non-resident taxation will be futile indeed." (Proceedings, pp. 40-7.)

"Intangible Personal Property Should be Taxed Only by the State of Domicile of the Decedent.

"The death taxes of each state, whether an estate tax or succession taxes are imposed, should apply to the following classes of property:

"1. When transferred by resident decedent—
  (a) Real property within the state.
  (b) Tangible personal property except that which has an actual *situs* outside the state.
  (c) Intangible personal property wherever located.

"2. When transferred by non-resident decedent—
  (a) Real property located within the state.
  (b) Tangible personal property having an actual *situs* within the state.

"As heretofore stated, real estate and tangible personal property can be taxed only by the state in which they have a physical *situs*. It is, therefore, in the case of intangible personal property that the difficulties arise. The committee is convinced that the only equitable and practicable rule is that which grants to the state of domicile the exclusive right to tax intangible property and takes away all right to tax intangible property of non-resident decedents.

"The foregoing is, in the opinion of the committee, the ideal arrangement. It is recognized, however, that many states may be reluctant to give up entirely and immediately the claim which they have previously exercised against the intangible property of non-residents. While the committee is firmly convinced that the taxation of such property is wrong in principle and should cease, it would suggest that those states which do not see their way to adopt this program in full should content themselves with a 2 per cent tax upon such property in accordance with the so-called Matthews plan as developed in New York, with a reciprocal provision

such as is now employed in Connecticut, Massachusetts, New York and Pennsylvania.

"Under the Matthews plan, a flat tax of 2 per cent is imposed upon all personal property within the jurisdiction of the state, belonging to a non-resident decedent. The tax is the same, regardless of the size of the decedent's gross estate and regardless of the relationship of the beneficiaries to whom the property passes. It is necessary, therefore, merely for an executor to file with the state authorities a statement under oath showing the amount of property within the state and the value thereof at the time of decedent's death. Upon the receipt of such a statement, the tax can immediately be determined, and upon payment of the tax a waiver can immediately be issued. No inventories, letters of administration, wills or other papers are required to be filed. The procedure is simple, direct and speedy. This method of assessing non-resident property, therefore, eliminates much of the inconvenience, expense and delay incident to the other methods in use.

"New York has developed this plan by adding an optional provision whereby an executor may report the assets and liabilities of the estate and pay a tax of 3 per cent upon the value of the property located in New York after deducting therefrom that proportion of deductions and exemptions which the value of the New York property bears to the value of the entire estate wherever situated. Under the Matthews plan, which allows no deductions whatever, insolvent estates have been required at times to pay taxes to transfer property which was located in a state other than that in which the decedent resided at the time of death. This injustice is eliminated by the New York optional provision. Notwithstanding the fact that the rate is higher and that far more detailed reports are required to be filed under this provision, it is an advantage to estates in which the debts and other obligations substantially reduce the gross assets.

"The reciprocal provision referred to provides that no tax is payable on the intangible personal property of a non-resident decedent if the decedent was a resident of a state or territory of the United States which at the time of the transfer does not tax the prop-

erty of decedents of the enacting state or has in its laws a reciprocal provision of similar intent." (Proceedings, pp. 48-50.)

These were the developments which lead up to the nation wide movement for reciprocity with respect to the imposition of death taxes on intangible personal property of non-resident decedents.

This movement is based upon two propositions, viz:

(a) That real property and tangible personal property should be taxed only on the basis of actual *situs*, and

(b) That intangible personal property should be considered as having a *situs* only at the domicile of the decedent and should be subjected to tax by the state of domicile alone.

It involves the enactment of laws by the several states whereby each state agrees not to tax intangible personal property of a decedent who was domiciled in another state if similar treatment is accorded by such state with respect to residents of the state enacting the law.

The effect is that one state death tax, and only one, is exacted with respect to intangible personalty, such tax being payable to the state of domicile of the deceased owner. Multiple state taxation of any property owned by a decedent is wholly eliminated.

New York was the first state to enact a reciprocal law (Chapter 143, Laws of 1925). Pennsylvania followed next and shortly afterwards was followed by Massachusetts and Connecticut.

The reciprocity principle applies not alone to states which have a reciprocal provision in their laws, but includes states which do not impose death taxes at all and states which impose death taxes but do not tax intangible personal property of non-resident decedents.

The growth of the reciprocity movement has been rapid and the reciprocal list now comprises twenty-one states and the District of Columbia, which are classified as follows:

(1) States which have enacted reciprocal laws: California, Connecticut, Illinois, Georgia, Maine (effective July 1, 1928), Maryland, New Hampshire, *New York, Ohio, Oregon, Pennsylvania.

(2) States which do not impose death taxes: Alabama, Florida, Nevada, District of Columbia.

(3) States which do not tax intangible personal property of non-resident decedents: Colorado, Delaware, Massachusetts (originally reciprocal), New Jersey, Rhode Island, Tennessee, Vermont.

It will be observed that while twenty-one is less than 50% in number of the states of the Union, nevertheless, the list includes most of the larger states, so that from the standpoint of wealth and population the percentage is much greater. Furthermore, the list includes most, if not all, of the states which have enjoyed popularity as states of incorporation for corporations.

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*The New York reciprocal provision was rendered ineffective because of the decision of the Court of Appeals of that state in SMITH v. LOUGHMAN, 245 N. Y. 486, but a bill is now pending before the New York Legislature designed to reinstate the reciprocal principle and doubtless will be enacted before this case is decided.

The movement for reciprocity is still under way and has the active support and co-operation of the National Tax Association, The National Bankers Association and the National Association of Corporate Fiduciaries, of several State Bar Associations (including New York), of the United States Chamber of Commerce, and of many other organizations and individuals.

If the spread of the movement is not interfered with, it is fair to assume that within a few years more than 90% of the intangible personal property of decedents will be subject to taxation only by the state of domicile.

Should the decision of the court on either the major or minor question be to the effect that the State of Connecticut was without power to impose a death tax, it will deal a death blow to reciprocity, as it will strike at the very heart of the theory upon which it is based, namely, that all intangible personal property should be taxed by the state of domicile and only by the state of domicile.

The death of reciprocity and the undoing of the result of years of effort in that direction will not, however, be the sole result. The effect will be much deeper and far reaching, particularly if the major question should be answered in the negative. It will mean the complete breakdown of death taxation by the states of the Union as applied to intangible personal property. This may appear to be a very broad statement but it is not believed to be too broad and it is thought that the argument to follow will fully justify it.

Why will there be such a breakdown? Because it will be possible to remove bonds, notes and evidences of indebtedness to states which do not impose death taxes. A

few large safe deposit vaults in the State of Florida would hold all of the intangibles of this character in the entire United States. Residents of states which do impose death taxes would find no difficulty in arranging to have such intangibles kept in these vaults. Nor is it necessary to go to Florida. The same thing could be accomplished in the District of Columbia or in either of the States of Alabama or Nevada. Manifestly, it would no longer be possible to tax bonds, notes and evidences of indebtedness except, perhaps, in small amounts when owned by the citizen of moderate means who, because of lack of information or carelessness, might keep his securities at home. The wealthy citizen, best able to pay a death tax, would not hesitate to avail himself of an entirely lawful means of escape from liability.

Certificates for shares of stock would be in the same category as other securities. These shares if owned directly by the decedent might be taxed by the state of domicile of the corporation but taxation would be avoided by the formation of holding corporations under the laws of one of the states which does not have death taxes and the placing of legal title to the shares in such corporation. The owner when he died would own only the shares of the holding corporation and these would be non-taxable.

What about debts? It would, of course, be legally possible for a state to tax debts due from its residents, both persons and corporations, but while legally possible, as a practical matter, it would be impossible. Assume that the State of New York should undertake to tax deposits made by non-residents in its banks. New York is the financial center of the country. Nearby are other states which would not hesitate to bid for this banking business by passing laws

exempting all deposits made in their banks from death taxes. The District of Columbia or Florida would perhaps be the beneficiaries. Intangible wealth is liquid. It flows readily in economic channels and will, of course, find its way to those places where, because of taxing laws or otherwise, the return may be enhanced and the effect of obnoxious laws evaded. Residents of New York would shun New York banks for by keeping their funds on deposit elsewhere death taxes could be avoided. New York would find itself in the same predicament that confronted it some years ago when it did tax debts due from its residents. There was a change in the money current and New York banks were unable to compete with banks of other states in securing deposits. New York would be compelled now as then to forego death taxes upon debts due from its residents and this class of intangible personal property would escape taxation entirely. New York has been used as an illustration because of its banking pre-eminence but what has been said would be equally true of other states.

There would be no class of intangible personal property that could not find a wide open road to tax evasion and the ultimate result could only be that such efforts as might be made to tax such property would prove futile and in the end the states would find themselves compelled to cease their efforts to impose death taxes thereon. It would not be possible to maintain an adequate and rational system of death taxation in the United States.

What has been said would apply equally if the minor question should be answered in the negative, except that the result would be to exempt only such bonds and other securities as might be classified as tangible property for death tax purposes.

The jurisdiction of domicile is the only one which is in position to secure the information necessary to levy a tax upon a decedent's intangibles and to enforce such a tax. Intangibles are readily concealed and transported. If within the jurisdiction of a state at the time of a decedent's death, they may be readily spirited out of that jurisdiction before the tax levy can be made effective and without administration in such jurisdiction. Rarely does it happen that administration can be avoided in the state of domicile for it is there that the decedent ordinarily has his real property and tangible personal property, and it is there that his personal representatives must submit themselves to the jurisdiction of the probate court.

Most states would not be benefited by a negative answer to either the major or minor questions if it would be possible to effectively tax all of a decedent's intangibles at some place, for reciprocity has already gone a long ways towards eliminating multiple taxation and the expense, inconvenience and delay incident thereto.

In *Blackstone v. Miller,* 188 U. S. 189, 206, Mr. Justice Holmes said:

> "When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way."

Paraphrasing that statement, we think it should be said here:

> "When logic and the policy of a state coincide with a fiction due to historical tradition, the fiction must hold, especially where the fiction has always controlled and public policies of the utmost importance have developed around it."

The effect of a decision adverse to Connecticut's contentions upon the safe deposit business must be considered. Enormous deposits of securities of non-residents are now in the custody of New York safe deposit companies and New York makes no effort to subject such securities to tax upon the death of the owner, being content that they should be subject to the authority of the state of domicile. Should the state of domicile be denied the right to tax, New York would be confronted with the same alternatives as in the case of bank deposits. To levy a tax would drive the bulk of the business from the state and do serious injury to business interests, whereas to continue the exemption from tax would mean that no tax whatsoever would be imposed.

Taxation is a highly practical science and it is being treated more and more in that light as the business of the nation becomes more diversified and intricate. Technicalities must not be permitted to prevail. We must pursue the substance and not the form. As a practical matter there can be no doubt but that death taxation of intangible personal property at the domicile of the decedent is indicated and there alone can it be applied and enforced with justice and with certainty. The practice of the states ever since death taxation was introduced into our state taxing systems and the decisions of state courts and of this court fully sustain taxation of intangibles at the domicile. As was said in *New York Trust Company v. Eisner*, 256 U. S. 345, 349:

> "Upon this point a page of history is worth a volume of logic."

The situation is much the same as was considered in *Southern Pacific Company v. Kentucky*, 222 U. S. 63. It was there held that Kentucky might impose a general property tax on ocean going steamers owned by a Kentucky cor-

poration on the ground that such steamers had a *situs* in Kentucky inasmuch as they did not have an actual *situs* elsewhere. The decision rested solely upon the *mobilia sequuntur personam* maxim because there is no port in Kentucky to which the steamers might come and they could never be physically in that state. There is greater reason to apply the maxim in the case of the intangibles here under consideration. Although the steamers had no actual *situs* anywhere, it was certain that in no event could they have one in Kentucky. Intangibles have no actual *situs,* not for the same reason, but because they have no physical existence. They do not constitute wealth in the sense the word is understood by economists but are merely an ownership of a right to receive something. If not evidenced by paper writings, there is nothing of substance connected with them. If so evidenced, it is possible for the paper writings to be taken to the state of domicile. In the very nature of things intangibles can have no actual *situs* in the sense that real property and tangible personal property, *i. e.*, wealth, have. The *mobilia sequuntur personam* rule had its origin in the fact that personal property was readily moved from place to place and at first applied only to tangibles. By *a fortiori* reasoning, its application to intangibles is manifest.

Counsel for the executors cite cases in which a foreign state has refused to allow the use of its courts to collect death taxes imposed by the state of domicile as proof that the latter state has no right to impose a tax. In so doing, the imposition of a tax and its collection are confused. An example of these cases is *Colorado v. Harbeck,* 232 N. Y. 71. A careful reading of this case will fail to disclose any claim that Colorado did not have the right to levy the tax. It is true that it could not enforce it. The same might be true

in the case of a resident of Kentucky owning steamships which have no actual *situs* anywhere. If these were the only property of such a resident it might not be within the power of Kentucky to get its tax, but this would have no bearing upon its right to assess it. Nor could New York deny Colorado the right to tax inasmuch as New York has always based its resident tax on the theory that the *situs* of intangible personal property is at the owner's domicile.

Finally, it should be observed that if the *mobilia sequuntur personam* rule is to be abandoned for death tax purposes, it must be abandoned for general property tax purposes also. Conceivably, it might be retained for the death tax and abandoned for the general property tax, but the converse seems impossible. To deny the state of domicile the right to subject intangible personal property to the general property tax on the theory of its *situs* at the owner's domicile would produce chaos. Many of the states are still relying mainly upon the general property tax as the source of state revenues. Imperfect as it is as applied to personalty, nevertheless a material portion of state revenues is raised by the general property tax thereon. Personalty constitutes practically the only relief for real property. The fact that real property is now overburdened with taxes need only be alluded to. It represents the most vexatious problem in taxation today. If taxation of personalty on the basis of domicile is to be done away with, there will be an instant rush to put intangible personalty where the tax laws may not reach it. New York already constitutes a haven. It has modernized its tax system and has recognized income as well as wealth as a proper tax base. In taxing income it has seen fit to exempt intangible personal property from the general property tax. Its safe deposit

vaults will be found yawning wide for the bonds, notes and evidences of indebtedness of residents of the general property tax states. The only possible result would be a greatly increased burden upon realty, depreciation in the value thereof, and a general upsetting of economic conditions, the effect of which it is difficult to estimate.

POINT II.

United States Bonds and Treasury Certificates are not tangible personal property and may be subjected to a death tax at the domicile of the owner.

That the United States bonds and treasury certificates which the Connecticut Court held could not be taxed in Connecticut are in fact intangible personal property is recognized in the Court's opinion. It was said (R. p. 74): "The United States bonds and treasury certificates are strictly speaking mere evidences of debts and intangible personalty." Notwithstanding this, it was thought that certain decisions of this Court, particularly the *State Tax on Foreign-held Bonds* case, 15 Wall. 300, had given said bonds and certificates the character of tangible personal property and made necessary the application of the rule of *Frick v. Pennsylvania, supra,* under which tangible personal property may be taxed for death tax purposes only at the place where it has an actual *situs.*

In the first place, it will be observed that this decision was contradictory for the court held that bonds of a corporation which were situated exactly the same as the United States bonds and treasury certificates were subject to the Connecticut tax. Manifestly, there is no difference for death tax purposes between United States and corporate

bonds. If one is tangible personal property surely the other is.

Also, it will be noted that the statement in the opinion in the *Foreign-held Bonds* case upon which the court relied was *obiter,* pure and simple. In addition, that case involved a property tax, not a death tax. The question was whether Pennsylvania might tax interest on bonds of a domestic corporation held by non-residents of that state. United States bonds and state and municipal bonds were in no way involved.

Furthermore, the language on which the Connecticut court relied was wrenched from its surroundings and the words of the opinion which qualified that language were omitted.

The Connecticut Court quoted the following from the opinion:

> "It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of and are treated as property, in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are."

This, in and of itself, is a qualified statement. It does not say that in every case and for every purpose actual *situs* will determine the right to tax, but it merely says that "in many cases" it will. There is nothing necessarily conflicting with a death tax at domicile.

Immediately following the above quotation it was said:

> "But other personal property, consisting of bonds, mortgages and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidence of debt, are not separated from the possession of the owners."

This language shows clearly that the court was not considering death taxes for in *Wheeler v. Sohmer,* 233 U. S. 434, it has since been held that a state may tax mortgage notes on the basis of physical *situs.* The same rule, however, was not applied in the case of a general property tax on mortgage notes in *Buck v. Beach,* 206 U. S. 392. See also *Crosby v. Town of Charlestown,* 78 N. H. 39.

What we think the court said in the *Foreign-held Bonds* case was that certain classes of bonds, mortgages and debts could have no *situs* independent of the domicile of the owner but state and municipal bonds, in addition to their *situs* at the domicile of the owner, could have a *situs* elsewhere.

The Connecticut court cited *People v. Home Insurance Company,* 29 Cal. 533, to the effect that state bonds of California were held to be taxable in California as personal property of a non-resident. This case is not out of harmony with our construction of the *Foreign-held Bond* case. The bonds in question had a business *situs* in California, having been deposited as a condition of the right of the insurance company to do business in that state. As a matter of fact, California applies the *mobilia sequuntur personam* maxim in the taxation of personal property.

Matter of Estate of Fair, 128 Cal. 607;

Westinghouse Company v. Los Angeles, 188 Cal. 491;

Chambers v. Mumford, 187 Cal. 228;
Matter of Estate of McCahill, 171 Cal. 482;
Matter of Estate of Hodges, 170 Cal. 492.

The executors contend that the Connecticut court in holding United States bonds and treasury certificates to be tangible personal property was merely construing the laws of Connecticut and, for that reason, no question under the federal constitution is involved. The Connecticut court did not, however, base its decision that these items could not be taxed upon any construction of the laws of that state, but rested its decision wholly upon the doctrine enunciated by this court in *Frick v. Pennsylvania, supra.* It cannot be denied that the law of Connecticut is broad enough to tax the bonds and certificates, if that may be done in consonance with the Constitution of the United States. Therefore, even if the Connecticut court had construed the bonds and certificates to be tangible personal property under Connecticut law they would still be taxable if Connecticut had the power to tax them. So the question resolves itself into this: Were the bonds and certificates tangible personal property under the law of this court or under the law of the State of New York so as to bring them within the *Frick* case? The question of their status under the law of this court has been briefly argued under this point and in detail in the brief for the petitioner and defendant-in-error. It is not understood that any contention is made that they were tangible personal property under the laws of the State of New York, and no cases are cited which so hold. As a matter of fact, under New York law the bonds and treasury certificates are intangible personal property. This proposition is so elementary that it is difficult to cite cases to support it. There are, however, a number of cases in which bonds are treated as intangible, such as *People ex rel. Alpha*

Portland Cement Co. v. Knapp, 230 N. Y. 48, and the New York Tax Law (Laws 1920, Ch. 647, as amd.) in defining "intangible personal property" for general property tax purposes expressly includes "bonds" and "evidences of debt."

Respectfully submitted,

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MAR 5
CHARLES ELM

Supreme Court of the United States

OCTOBER TERM, 1927.

Nos. 189 and 191.

WILLIAM S. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT,

Petitioner,

vs.

ARTHUR SHERMAN, CHARLES MORRIS, JOSEPH PLAUT, *et al.*, Executors,

Respondents.

BRIEF OF AMICI CURIAE AND ON BEHALF OF ESTATE OF JAMES B. DUKE, DECEASED.

WILLIAM R. PERKINS,
SOL. H. STRAUSS,
FORREST HYDE,
Amici Curiae.

HARRY H. SHERIDAN,
Of Counsel.

Printed by Law Printing Service, 115 C. S. Reporting Inc., 69 Liberty Street, New York

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1927.

WILLIAM N. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, Petitioner, *against* ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, Respondents.	Nos. 190, 191.

Notice of Motion for Leave to File a Brief as Amici Curiae.

PLEASE TAKE NOTICE that the undersigned, acting as counsel for litigants interested in the questions involved in the above entitled suit, will move this Court at the opening of the Court on the 5th day of March, 1928, or as soon thereafter as counsel can be heard, for leave to file a brief as *amici curiae*, and for such other or further relief as may be proper.

New York, March 2, 1928.

WILLIAM R. PERKINS
SOL M. STROOCK
FORREST HYDE
Amici Curiae.

HARRY H. SHELTON,
of Counsel.

To:

ABRAHAM L. GUTMAN, Esq., and
KENNETH DAYTON, Esq.,
Attorneys for Taxpayer.

CHARLES EVANS HUGHES, Esq.,
Counsel for William N. Blodgett,
Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1927.

WILLIAM N. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, Petitioner, *against* ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, Respondents.	Nos. 190, 191.

Petition for Leave to File Brief as Amici Curiae.

The undersigned respectfully petition this honorable Court for leave to file a brief as *amici curiae* in the above entitled matter.

Your petitioners apply as counsel for the Executors of the Estate of James B. Duke, who died domiciled in the State of New Jersey on October 10, 1925. The decedent left a gross estate of more than $80,000,000.00, consisting of real estate, shares of stock in various corporations, public securities in coupon form payable to bearer, and consisting of Liberty Bonds, State, municipal and corporate bonds all in coupon form payable to bearer, bank accounts and currency. All of the public securities, corporate bonds, bank accounts and currency were acquired in the State of New York, were permanently located there prior to and at the time of decedent's death, and constituted part of the capital with which he carried on his business in that State. The State of New Jersey is attempting to include as a part of the

taxable estate within its jurisdiction such public securities, corporate bonds, bank accounts and currency, and to assess an inheritance tax upon the transfer thereof by his death.

Your petitioners' clients are vitally interested in the decisions on the questions involved in the above entitled suit.

Notice of this application having been served on counsel for the respective parties in the above entitled suit, this motion is now respectfully submitted for the consideration and action of the Court.

New York, March 2, 1928.

WILLIAM R. PERKINS
SOL M. STROOCK
FORREST HYDE
Amici Curiae.

HARRY H. SHELTON,
of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1927.

WILLIAM N. BLODGETT, TAX COMMISSIONER OF THE STATE OF CONNECTICUT, Petitioner, *against* ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLAUT, *et al.*, Executors, Respondents.	Nos. 190, 191.

BRIEF SUBMITTED ON BEHALF OF THE EXECUTORS OF THE ESTATE OF JAMES B. DUKE.

Statement.

The Executors of the Estate of James B. Duke file this brief *amici curiae* in opposition to the contention of the Petitioner that the State of Connecticut has the power to impose a succession tax on the transfer by will of a resident of that State of the ownership of the following classes of property which had their *situs* in the State of New York at the testator's death, namely:

(a) Bearer Liberty Bonds;
(b) Bearer Treasury Certificates;
(c) Cash (Coins and Bank Notes).

The Executors of James B. Duke, deceased, are vitally interested in this contention because of a similar

situation which has arisen in the administration of that estate. He died a resident of New Jersey. At that time and for many prior years he had had an office in New York City, and in that city he had acquired and kept a great many of his securities, consisting of bearer, State, municipal and corporate bonds. They had never been in the State of New Jersey, but had a permanent *situs* in New York. There were also the bank accounts he had continuously kept in New York City.

The question presented, therefore, is the same in the two cases, namely, whether the maxim *mobilia sequuntur personam* will be indulged to the extent of making taxable at the owner's domicil such items of personal property if they had acquired an actual *situs* in another state at the time of his death.

I.

The issue is one of fact, not of law.

There is nothing new in the concept that jurisdiction is necessary to taxation. The principle is old and has always been recognized. The difficulty has lain in determining when such jurisdiction existed.

A study of the cases shows that the path of progress here, as in many other branches of the law, has been from fiction to fact, from technicality to actuality, until today the law on this subject has been bottomed by this Court on the realities of the particular situation.

There was a time when the maxim *mobilia sequuntur personam* held full sway. And based on it there long persisted a distinction with respect to the kind of taxation involved.

In 1903 in *Blackstone* v. *Miller*, 188 U. S. 189, at page 204 the Court said: "No one doubts that succession to

a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a *universitas* and is taken into account again in the succession tax there". It regretted "that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other hand, at the same time, according to the fiction that, in successions after death, *Mobilia sequuntur personam* and domicil governs the whole" but affirmed "these inconsistencies infringe no rule of constitutional law."

In 1907 in *Buck* v. *Beach*, 206 U. S. 392, 408, and again as late as 1914 in *Wheeler* v. *Sohmer*, 233 U. S. 434, 440, 446, this distinction between a property and a succession tax was prominent in the opinion of the court.

Today these fictions and distinctions, under the impulse of the excessive and unjust duplication of taxation to which they gave free rein, have largely become things of the past. *Jurisdiction is a question of fact. Therefore, taxability is a question of fact,* namely, has the particular asset acquired a *situs* distinct from the domicil of its owner. *Frick* v. *Pennsylvania* (1925), 268 U. S. 473; *R. I. Hospital Trust Co.* v. *Doughton* (1925), 270 U. S. 69, 80, and *Wachovia Bank & Trust Co.* v. *Doughton* (1926), 272 U. S. 567.

The technical barrier now being interposed by the states to the broad application of this sound, simple and salutary standard is the equally fictitious classification of personal property into tangible and intangible. And the argument for it is based on the fact that the *Frick Case* involved so-called tangibles only and the opinion in it states that *Blackstone* v. *Miller, supra,* and *Bullen* v. *Wisconsin* (1916), 240 U. S. 625 "related to intangible personalty, which has been regarded as on a different footing from tangible personalty" (268 U. S. at p. 494).

But we feel confident on the one hand that the items involved here are tangible within the purview of the *Frick Case,* if such be essential; and on the other hand that this Court intended, and has applied, the *Frick Case* as a limitation of the *universitas* whenever the asset involved has acquired an actual *situs* uncontrolled by mere terminology.

There can be no common sense or justice in the courts laying hold upon actual situs only to produce double taxation. There is no magic in the word tangible or intangible to require such an arbitrary result. It may be true that a particular item of property is of such a nature that it is incapable of acquiring an actual situs but it cannot be true that an item which has acquired an actual situs retains a fictitious situs at the same time for the purpose of tax jurisdiction. Actual situs should either be given its full consequence or none, else we have the courts doing the inconsistent thing of attributing diverse characters and locations to the same item of property at the very same time.

As long ago as 1861 the Court of Appeals of New York in *Hoyt* v. *The Commissioners of Taxes,* 23 N. Y. 224, truly expressed the situation in the following apt and striking language which is most pertinent here:

> "Accordingly there seems to be no place for the fiction of which we are speaking, in a well adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the *situs* of the property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed we are bound to assume, that

> other States and Governments have adopted the same rule. If then proceeding on the true principles of taxation, we subject to its burdens all goods and chattels actually within our jurisdiction, without regard to the owner's domicil, it must be understood that the same rule prevails everywhere. If we also proceed on the opposite rule, and impose the tax on account of the domicil, without regard to the actual *situs*, while the same property is taxed in another sovereignty by reason of its *situs* there, we necessarily subject the citizen to a double burden of taxation. For this no sound reason can be given." (p. 228).

This case has been often approved by this Court and portrays, in our opinion, the true situation and remedy. Thus in *Union Refrigerator Transit Co.* v. *Kentucky* (1905), 199 U. S. 194, the Court voiced the same view in the following language:

> "Most modern legislation upon the subject has been directed (1) to the requirement that every citizen shall disclose the amount of his property subject to taxation, and shall contribute in proportion to such amount; and (2) to the avoidance of double taxation." (p. 203).
>
> "'No fiction', says Blackstone, 'shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, that might result from the general rule of law' (3 Bl. Com. 43). The opinion (in *People ex rel. Hoyt* v. *Tax & A. Com'rs.*, 23 N. Y. 224) argues with great force against the injustice of taxing extraterritorial property when it is also taxable in the state where it is located." (p. 208, citing other cases to same effect).

II.

Money in hand and on deposit, public securities, notes and bonds and certificates of stock are tangible within the purview of the Frick Case.

With respect to money in hand and on deposit, sufficient authority is *Blackstone* v. *Miller* (1903), 188 U. S. 189, where this Court in holding that New York could impose a transfer tax on deposits of a non-resident decedent in the banks of that State, said:

> "The question, then, is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. *Re Houdayer*, 150 N. Y. 37; *New Orleans* v. *Stempel*, 175 U. S. 309, 316; *City Nat. Bank* v. *Charles Baker Co.*, 180 Mass. 40, 42. In view of these cases and the decision in the present case, which followed them, a not very successful attempt was made to show that by reason of the facts which we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank." (p. 205).

With respect to public securities, the law is settled as stated in the leading case of *State Tax on Foreign Held Bonds* (1873), 15 Wall. 300, where this Court said:

> "It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicil of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of state bonds and

> bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of and are treated as property, in the place where they are found, though removed from the domicil of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages and debts generally, has no *situs* independent of the domicil of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners." (p. 323-4).

With respect to notes and bonds and certificates of stock the concluding sentence of the quotation last made has been distinctly qualified and it is now settled that such items are tangible property and not mere evidences of ownership.

Thus in *New Orleans* v. *Stempel* (1899), 175 U. S. 309, 322, this Court said:

> "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that if found within its limits they shall be subject to taxation."

And it remarked of the quotation we made above from the case of *State Tax on Foreign Held Bonds* (p. 321):

> "This last sentence, properly construed, is not to be taken as a denial of the power of the legis-

> lature to establish an independent *situs* for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their *situs* to be that of the domicil of the owner, a declaration which the legislature has no power to disturb *when in fact they are in his possession.*"

Again in *Blackstone* v. *Miller*, 188 U. S. 189, 206, the Court said:

> "There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds*, 15 Wall. 300, *sub. Nom. Cleveland P. & A. R. Co.* v. *Pennsylvania*. The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker*, 177 Mass. 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the state could not be reached. The decision has been cut down to its precise point by later cases. *Savings & L. Soc.* v. *Multnomah County*, 169 U. S. 421, 428; *New Orleans* v. *Stempel*, 175 U. S. 309, 319, 320."

Finally in *De Ganay* v. *Lederer*, 250 U. S. 376, the Court on a very full consideration said at p. 381:

> "To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. By state and Federal statutes they are often treated as property, not as mere evidences of the interest which they represent."

It quoted with approval from *People ex rel. Jefferson* v. *Smith*, 88 N. Y. 576, 585, as follows:

> "'It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages, bonds, bills, and notes have for many purposes come to be regarded as property, and not as the mere evidences of debts, and that they may thus have a *situs* at the place where they are found, like other visible, tangible chattels.'"

and it concluded:

> "this Court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds, and mortgages may acquire a *situs* at a place other than the domicil of the owner, and be there reached by the taxing authority * * * (citing cases). Shares of stock in national banks this Court has held, for the purpose of taxation, may be separated from the domicil of the owner, and taxed at the place where held. *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490." (p. 382.)

In this connection it should be borne in mind that stock certificates are now negotiable by the Uniform Stock Transfer Act which has been adopted in a great number of the states, including New York (see Personal Property Law, Chap. 41, Sec. 162, *Travis* v. *Knox Co.*, 215 N. Y. 259, and *Mitchell* v. *Boyer*, 160 App. Div. N. Y. 565). This shows the trend of modern thought and legislation in treating such instruments as being property in and of themselves.

In *Selliger* v. *Kentucky* (1909), 213 U. S. 200, 204, this Court said of a like statute with respect to warehouse receipts:

> "We are dealing with German receipts, and therefore we are not called upon to consider the effect of statutes purporting to make such instruments negotiable. Bonds can be taxed where they

are permanently kept, because, by a notion going back to very early law, the obligation is, or originally was, inseparable from the paper or parchment which expressed it. Buck *v.* Beach, 206 U. S. 392, 403, 413. That case and the authorities cited by it show how far a similar notion has been applied to negotiable bills and notes. But a warehouse receipt does not depend upon any peculiar doctrine for its effect. A simple receipt merely imports that goods are in the hands of a certain kind of bailee."

III.

The Universitas is now limited by actual situs whenever acquired.

The crux of the *Frick Case* was the kind of tax imposed, not the property involved. The point of that decision was the limitation of the *universitas* by actual *situs*.

In 1899 in *New Orleans* v. *Stempel*, 175 U. S. 309, 318-9, this Court approved many state cases holding actual *situs* of notes to be a limitation on property taxation. Yet in 1903 in *Blackstone* v. *Miller*, 188 U. S. 189, 206, we find the court regretting that the same state at the same time might impose a succession tax on the one hand according to fact and on the other hand according to fiction on even tangible property.

This was the situation which the *Frick Case* remedied. It did so on the basis of actual *situs*. And thereby it brought succession taxation into harmony with property taxation in respect of jurisdiction. So while the *Frick Case* involved only tangibles so-called, we cannot believe that the Court did not really intend the relief to be as complete as the principle is broad, namely, as actual *situs* might be acquired for taxation. Any other conclu-

sion would be at once illogical, unnatural and unjust. And, in our opinion, subsequent decisions have so applied the *Frick Case.*

Thus in *R. I. Hospital Trust Co.* v. *Doughton* (1925), 270 U. S. 69, 80, in holding that North Carolina could not validly impose a transfer tax upon shares of stock owned by a non-resident in a New Jersey corporation although the corporation did business and had two-thirds of its property in that state, the Court said:

> "The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a property tax. A state has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred. In the matter of intangibles, like choses in action, shares of stock and bonds, *the situs of which is with the owner*, a transfer tax of course may be properly levied by the state in which he resides. So, too, it is well established that the state in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or non-residents (citing cases)."

We call particular attention to the careful phrase of limitation which we have italicized because it seems a plain and broad adoption of *situs* as the real test of jurisdiction for transfer or property taxation. For the phrase would be entirely unnecessary if the Court meant such assets were always taxable at the owner's domicil regardless of *situs*. And if the Court did not mean the phrase to be a limitation to actual *situs* then the Court has abrogated the express qualification in *New Orleans* v. *Stempel*, 175 U. S. 309, 322, and again in *Blackstone* v. *Miller*, 188 U. S. 189, 206, of the similar language in

State Tax on Foreign Held Bonds, supra, to which we have already called the Court's attention (*ante,* pp. 11-12).

In *Wachovia Bank & Trust Co.* v. *Doughton* (1926), 272 U. S. 567, the Court held North Carolina could not impose a transfer tax on the exercise by will of a resident of that State of a power of appointment given by will of a resident of Massachusetts over securities held in Massachusetts upon a trust created by the latter will because the property was not within the jurisdiction of North Carolina; and Justices Holmes, Brandeis and Stone joined in a separate opinion by the former which concluded with this significant statement:

> "I dare say that it may be desirable to limit the universitas, as was done in *Frick* v. *Pennsylvania,* 268 U. S. 473, but I cannot help doubting whether the present decision can be reconciled with Bullen's Case." (p. 576).

This statement necessarily meant a limitation of the *universitas* to actual *situs* with respect to intangibles so-called. It occurred in a case involving no chattels and *Bullen's Case* involved no chattels and is one of the cases referred to in the *Frick Case* as showing intangibles had been regarded as on a different basis.

IV.

Kirtland v. Hotchkiss (1879), 100 U. S. 491, and Fidelity & C. Trust Co. v. Louisville (1917), 245 U. S. 54, which is identical with and followed it, are not in point because of the very different kind of tax involved.

In each the question was whether a state, in ascertaining the tax its residents should pay, could measure the tax by property (bonds in the former and bank deposits in the latter) in another State. And an affirmative an-

swer was given because the tax was upon the person in exercise of the power which a State has over its own citizens—a different case altogether.

This is apparent from the opinions and was the explanation given of *Kirtland* v. *Hotchkiss* in the subsequent cases of *New Orleans* v. *Stempel* (1899), 175 U. S. 309, 321 and *Liverpool Insurance Co.* v. *Assessors* (1911), 221 U. S. 346, 355 which, of course, likewise, apply to *Fidelity & C. Trust Co.* v. *Louisville.*

Thus in *Kirtland* v. *Hotchkiss* the conclusion of the Court was thus stated:

> "Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, and with which the Federal Government cannot rightly interfere." (p. 499).

While in *Fidelity & C. Trust Co.* v. *Louisville* the Court said:

> "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed." (p. 58).

And in answer to the argument that debts situated beyond the taxing jurisdiction should be exempt the same as chattels, it remarked:

> "But this court has not attempted to press the principle so far, and there is opposed to it the

> long-established practice of considering the debts due to a man in determining his wealth at his domicil for the purposes of *this sort of tax.*" (p. 59).

The statement in *Kirtland* v. *Hotchkiss* that a "bond, wherever held or deposited, is at best only evidence of the debt, not the debt itself" was not necessary to the decision and must be regarded as overruled by the subsequent cases, such as *New Orleans* v. *Stempel, Blackstone* v. *Miller, Wheeler* v. *Sohmer* and *DeGanay* v. *Lederer,* clearly holding to the contrary and which have restricted *Kirtland* v. *Hotchkiss* to its exact point, namely, a tax by a state under its authority over the person of its citizen.

Respectfully submitted,

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